SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 496.

THE UNITED STATES, PETITIONER,

vs.

THE M. H. PULASKI COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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2 1346

United States Court of Customs Appeals.

THE M. H. PULASKI CO. ET AL., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1346.

Transcript of record on appeal from the Board of United States General Appraisers.

Curie, Smith & Maxwell, attorneys for appellants.

Printed under the direction of the clerk.
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1 *Petition.*

United States Court of Customs Appeals.

THE M. H. PULASKI CO., JOHNSON & FAULKNER, JOHN Pullman & Co., appellants,
vs.
THE UNITED STATES, APPELLEE. } No. 1346.

To the honorable the United States Court of Customs Appeals:

The appellants having complied with the statutes in such cases made and provided and being dissatisfied with the decision of the Board of United States General Appraisers made herein within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule B, which is hereby made a part hereof, as to construction of the law, and the facts respecting the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully pray your court to review the questions involved in said decision, also for such relief in the premises as the law provides or as to the court shall seem just.

The particulars of the errors of law and fact involved in said decision with which the appellants are dissatisfied are set forth in the annexed Schedule A, which is hereby referred to and made part hereof.

Dated, New York, March 7, 1914.

THE M. H. PULASKI CO.,
JOHNSON & FAULKNER,
JOHN PULLMAN & CO.,
Appellants.

By CURIE, SMITH & MAXWELL,
Attorneys for Appellants, 32 Broadway, New York City.

Schedule A.

The Board of United States General Appraisers affirmed the decision of the collector and thereby committed the following errors of law and fact: The said board erred:

1. In holding that goods, wares, and merchandise imported in vessels of Belgium, the Netherlands, and (being the production of Great Britain) in vessels of the British Empire are not entitled to a discount of 5 per centum of the duties imposed by law or assessed by the collector.

2. In not holding that a discount of 5 per centum on all
2 duties imposed by the tariff act of October 3, 1913, or assessed thereon by the collector of customs, should be allowed on all such goods, wares, and merchandise, under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, or the provisions of said subsection and such provisions of the following treaties or conventions between the United States and the respective foreign nations as are applicable to the vessels of the contracting parties, or to merchandise imported in such vessels, or by virtue of the "favored-nation" provisions in said treaties or conventions or in treaties or conventions with the country of the origin or exportation of said merchandise.

Treaties.

Nation.	Concluded.	Proclaimed.	Provisions.
Belgium	March 8, 1875	June 29, 1875	Art. I, II, IV, V, VI, VII, XI, XII, etc
Great Britain	July 3, 1815	December 22, 1815.	"Article the Second," etc.
Netherlands	August 26, 1852	February 26, 1853.	Art. I, II, III, etc.

or other applicable provisions in the foregoing treaties, and the treaties, conventions, agreements, proclamations, regulations, and laws in such case made and provided.

3. In holding that the applicable provisions of said treaties or conventions are not self-executing but executory; that they are not to be treated as the supreme law of the land and, as such, enforceable by judicial tribunals; and that the question of their application is a political rather than a judicial question.

4. In holding that said treaty provisions, if deemed self-executing, would invade the functions of the House of Representatives in originating revenue bills, or the constitutional privileges of Congress to lay and collect duties, or that they would be opposed to the spirit and letter of the Constitution.

5. In failing to hold, in any event, that the proviso of said subsection 7 of paragraph J of Section IV of said act gives force and effect to said treaty provisions as fully to all intents and purposes as if they had been enacted as laws, making them fully executed and enforceable in the courts, and requiring judicial tribunals

3 to construe the treaties and the statute together and to avoid a construction which will deprive either of effect.

6. In construing said subsection 7 of paragraph J of Section IV of said act so as to abrogate, impair, or affect the provisions of the treaties and conventions herein mentioned or in such case made and provided.

7. In holding that so much of said merchandise as was imported prior to October 3, 1913, and remained in bonded warehouse on or after that date, is not entitled to said discount of 5%.

8. In overruling the protests of the importers and affirming the action of the collector.

9. In not sustaining the protest of the importers and reversing the action of the collector.

Schedule B.

The following are the importations and entries covered by this proceeding, with the approximate dates thereof, and with such other data as are convenient for purposes of identification:

Date of board's decision, Mar. 6, 1914.

Vessel.	Date of entry.	Entry No.	Board No.	Collector's No.
		The M. H. Pulaski Co.		
Ryndam	Oct. 7/13	279310	727693	34880
		Johnson & Faulkner.		
Vaderland	Oct. 6/13	277017	726868	34881
		John Pullman & Co.		
Caledonia	Oct. 7/13	274128	726898	24882

Endorsed: United States Court of Customs Appeals. Filed Mar. 9, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued March 9, 1914.

ARTHUR B. SHELTON, *Clerk.*

4 *Bond.*

Bond of Herbert M. Wallace, in the sum of twenty-five dollars, approved by R. M. Montgomery, presiding judge. Filed March 9, 1914.

Return of the board.

United States of America, Board of United States General Appraisers, New York. ss.

The M. H. Pulaski Co. et al., appellants, vs. The United States, appellee. Board's protest Nos. 727693, etc., collector's Nos. 34880, etc., suit No. 13[illegible]3.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and

fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the ninth day of March, 1914, required the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protest 727693/34880 with the report of the collector of customs thereon;

2. The other protests covered by the petition with the reports thereon enclosed herewith in a separate envelope;

3. The three stipulations upon which the protests were submitted;

4. A copy of the board's decision in question, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, President of the Board, this thirteenth day of March, A. D. 1914.

5 [SEAL.] D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount.

Protest 727693/34880.

NEW YORK, N. Y., *December 8, 1913.*

COLLECTOR OF CUSTOMS, *New York.*

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on certain merchandise covered by the entries described in the annexed Schedule A, which is hereby made a part hereof, claiming—

1. That said merchandise is entitled to a discount of 5 per centum of all duties charged or exacted by you or imposed thereon by the tariff act of October 3, 1913. Said discount accrues under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, or the provisions of said subsection and such provisions of the following treaties or conventions between the United States and the respective foreign nations as are applicable to vessels of the nationalities mentioned in said Schedule A, or to merchandise imported in such vessels; or by virtue of the "favored-nation" provisions in said treaties or in treaties with the country of the origin or exportation of the merchandise:

Treaty.

Nation.	Concluded.	Proclaimed.	Provisions.
Austria-Hungary	August 27, 1829	February 10, 1831.	Art. I, II, III, IV, V, IX, etc.
Belgium	March 8, 1875	June 29, 1875	Art. I, II, IV, V, VI, VII, XI, XII, etc.
China	November 17, 1880	October 5, 1881	Art. III, etc.
	October 8, 1903	January 13, 1904	Art. V, etc.
Denmark	April 26, 1826	October 14, 1826	Art. 1, 2, 3, 4, etc.
	April 11, 1857	January 13, 1858	Art. V, etc.
France	June 24, 1822	February 12, 1823.	Art. 1, 2, 7, etc.
Germany (see treaties with Hanseatic Republics, Mecklenburg-Schwerin, and Prussia).			
Great Britain	July 3, 1815	December 22, 1815	"Article the second," etc.
Greece	December 22, 1837	August 30, 1838	Art. II, III, VII, VIII, IX, etc.
Hanseatic Republics	December 20, 1827	June 2, 1828	Art. I, II, IX, etc.
Italy	February 26, 1871.	November 23, 1871	Art. I, II, V, VI, etc.
Japan	February 21, 1911.	April 5, 1911	Art. I, IV, V, VI, VIII, IX, X, XI, XII, XIV, etc.
Mecklenburg-Schwerin	December 9, 1847.	August 2, 1848	Art. 1, 6, 7, etc.
Netherlands	August 26, 1852	February 26, 1853.	Art, I, II, III, etc.
Prussia	May 1, 1828	March 14, 1829	Art. II, III, IV, V, IX, etc.
Spain	July 3, 1902	April 20, 1903	Art. II, VII, VIII, etc.
Sweden and Norway	July 4, 1827	January 19, 1828	Art. II, III, V, VIII, IX, X, etc.
Switzerland	November 25, 1850	November 9, 1855.	Art. I, II, V, etc.

6 or other applicable provisions in the foregoing treaties or the treaties, conventions, and statutes in such case made and provided.

2. That by your failure or refusal to allow or deduct upon said merchandise a discount of 5 per centum of the duties assessed by you or imposed thereon by said tariff act, you have so construed said subsection 7 of paragraph J of Section IV thereof as to abrogate, impair, or affect the provisions of the treaties and conventions herein mentioned or in such case made and provided.

3. That all merchandise contained in the importations herein mentioned which has been imported in vessels of other countries than those named herein, is entitled to said discount of 5 per centum of said regular duties, under and by virtue of said subsection 7 of paragraph J of Section IV of said act of October 3, 1913, the existing treaties with the respective countries, and all other treaties, conventions, and statutes in such case made and provided.

4. That all of such merchandise which has been imported in vessels admitted to registration under the laws of the United States is enti-

tled to said discount of 5 per centum under and by virtue of said subsection 7 of paragraph J of Section IV of said tariff act of October 3, 1913.

5. In the alternative, that the effect of said subsection 7 of paragraph J of Section IV is (a) to reduce the amount of duty by 5 per centum of the total amount charged or exacted by you, or imposed by the paragraphs of said tariff act, or (b) to reduce the rate of duty by 5 per centum of the value of said merchandise.

6. That the merchandise is not dutiable at the rate or rates charged by you and that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

7 We give notice that we pay all other rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods, that we hereby reserve all questions of law and fact, and are prepared to substantiate by proof every allegation of fact contained in the within protest. We claim the right of reasonable notice of the time and place when an opportunity will be afforded us to furnish such proof.

The references to treaties and other data herein given are for your convenience and are not to be taken as restricting this protest or relieving you from the duty of taking cognizance of all treaties or laws affecting said merchandise whether cited herein or not.

Schedule A.

Vessel, "Ryndam"; nationality of vessel, Netherlands; date of entry, Oct. 7/13; entry No. 279310; if warehouse W. H. bond, 80011; date of liquidation, Nov. 11/13; marks and numbers of packages, as per invoices and entries.

THE M. H. PULASKI CO.,
CURIE, SMITH & MAXWELL,
Attorneys, 32 Broadway, N. Y.

Endorsed: Customhouse, New York. Received Dec. 10, 1913.

Report of the collector.

JAN. 8, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

8 *Corrected stipulation.*

In the matter of protest 727693/34880 of the M. H. Pulaski Company claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants that the merchandise covered by the protest above mentioned consists of cotton embroideries manufactured in Switzerland, imported by the S/S "Ryndam," of the Holland-American Line, entered at the port of New York on or about October 7, 1913, and covered by entry 279310; that said vessel is and was at the time of such importation a vessel of the Netherlands, sailing and entitled to sail under the flag of the Netherlands, and that in liquidating the duties upon said merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

It is also stipulated that like merchandise, the product of the soil or industry of the United States, is imported into the Netherlands in vessels of the United States.

It is further stipulated that the above-mentioned protest may be deemed submitted upon the record and the foregoing stipulation as to the facts; such reasonable time for briefs as may be allowed by the board being reserved to both parties.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.
CURIE, SMITH & MAXWELL,
Attorneys for the Importers.

Dated January 14, 1914.

Stipulation.

In the matter of protest 726868/34881 of Johnson & Faulkner, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants, that the merchan-
9 dise covered by the protest above mentioned consists of cotton cloth manufactured in France, imported by the S/S "Vaderland," of the Red Star Line, entered at the port of New York on or about October 6, 1913, and covered by entry 277017; that said vessel is and was at the time of such importation a Belgian vessel, sailing and entitled to sail under the Belgian flag, and that in liquidating the duties upon said merchandise the collector disallowed the discount of 5 per centum claimed by the protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

It is also stipulated that like merchandise, the product of the soil or industry of the United States, is imported into Belgium in vessels of the United States.

It is further stipulated that the above mentioned protest may be deemed submitted upon the record and the foregoing stipulation as to the facts; such reasonable time for briefs as may be allowed by the board being reserved to both parties.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.
CURIE, SMITH & MAXWELL,
Attorneys for the Protestants.

Date. January 14, 1914.
Endorsed: U. S. Gen. Apprs. Received January 14, 1914.

Corrected stipulation.

In the matter of protest 726898/34882 of John Pullman Company, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants, that the merchandise covered by the protest above mentioned consists of linen handkerchiefs and linens manufactured in Ireland, imported by the S/S Caledonia of the Anchor Line, entered at the port of New York on or about October 7, 1913, and covered by entry 274128; that said vessel is and was at the time of such importation a British vessel, sailing and entitled to sail under the British flag, and that in liquidating the duties upon said merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

It is also stipulated that like merchandise, the product of the soil or industry of the United States, is imported into Great Britain in vessels of the United States.

It is further stipulated that the above mentioned protest may be deemed submitted upon the record and the foregoing stipulation as to the facts; such reasonable time for briefs as may be allowed by the board being reserved to both parties.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.
CURIE, SMITH & MAXWELL,
Attorneys for the Importers.

Dated, January 14, 1914.
Endorsed: U. S. Gen. Apprs. Received Jan. 14, 1914.

Decision of the board.

(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, etc., of J. Elliott & Co. et al. against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute
11 in subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as sems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

"The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent reciprocal courtesies as between other countries and the United States

12 with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law as far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving
13 in American vessels; and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the mean-

ing of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true
14 there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37), the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

15 Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7,
16 but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right

extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And,
17 further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels.

And, reciprocally, all kinds of merchandise and articles of
18 commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local

authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are to their full extent applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties while varying in the letter are practically the same in substance, and so far as the decision in this case is concerned may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may
19 be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can

be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

20 "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force, and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is
21 not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to

question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

22 The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the

United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding
23 that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views
24 are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the

Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131 a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war, and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." Would anyone contend that in spite of this provision of the Constitution the treaty-making power of the Government, the President, and Senate would have power to declare war? We think not.

How far the President and Senate are authorized to go in
26 making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws andtreaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as the House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 352 et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 et seq.). Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and
27 laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent

discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry,
28 and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel

admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipu-
29 lations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Importer.	Protest.
* * * *	* * * *
The M. H. Pulaski Co.	727693/34880
Johnson & Faulkner	726868/34881
John Pullman & Co.	726898/34882
* * * *	* * * *

Endorsed: United States Court of Customs Appeals. Filed Mar. 14, 1914. Arthur B. Shelton, clerk.

30 United States Court of Customs Appeals.

THE M. H. PULASKI CO., JOHNSON & FAULKNER, John Pullman & Co. *v.* THE UNITED STATES. } No. 1346.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1346, The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co. v. The United

States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

31 United States Court of Customs Appeals.

THE M. H. PULASKI CO., JOHNSON & FAULKNER, John Pullman & Co., appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 1346.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

32 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,
v.
The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,
v.
The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

33 No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,

v.

William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,

v.

Park & Tilford, appellee.

No. 1396.

The United States, appellant,

v.

Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,

v.

The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,

v.

The United States, appellee.

the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importation the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

34 United States Court of Customs Appeals.

THE M. H. PULASKI CO., JOHNSON & FAULKNER, JOHN Pullman & Co., appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 1346.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, vs. The United States, appellee, No. 1353.

35 United States Court of Customs Appeals.

THE M. H. PULASKI CO., JOHNSON & FAULKNER, JOHN Pullman & Co., appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 1346.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

36 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which The M. H. Pulaski Company et al. are appellants and The United States is appellee, No. 1346, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and pro-

ceedings therein should be certified by the said Court of Customs Appeals and removed into the Supreme Court of the United
37 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 24,777. Supreme Court of the United States, No. 1033, October term, 1914. The United States vs. The M. H. Pulaski Company et al. Writ of certiorari.

38 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
THE M. H. PULASKI COMPANY ET AL. } No. 1033.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
THOMAS M. LANE,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

39 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The M. H. Pulaski Co. et al. v. The United States, No. 1346, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk, Supreme Court U. S. Received June 29, 1915.

40 (Indorsed:) File No. 24777. Supreme Court U. S., October term, 1915. Term No. 496. The United States, petitioner, vs. The M. H. Pulaski Company et al. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24777. U. S. Court of Customs Appeals. Term No. 496. The United States, petitioner, vs. The M. H. Pulaski Company et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24777.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 497.

THE UNITED STATES, PETITIONER,

vs.

R. B. HENRY COMPANY ET AL.

No. 498.

THE UNITED STATES, PETITIONER,

vs.

JAMES ELLIOTT & COMPANY ET AL.

No. 499.

THE UNITED STATES, PETITIONER,

vs.

J. WILE SONS & COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

R. B. HENRY CO. ET AL., APPELLANT,
vs. No. 1353.
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JAMES ELLIOTT & CO. ET AL., APPELLANTS,
vs. No. 1355.
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THE UNITED STATES, APPELLANT,
vs. No. 1391.
J. WILE SONS & CO., APPELLEES.

Transcript of record on appeal from the Board of United States General Appraisers.

Comstock & Washburn, attorneys for importers.
William L. Wemple, Assistant Attorney General, attorney for the United States.
Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed Jun. 1, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

PETITION.—United States Court of Customs Appeals. R. B. Henry Co., *et al.*, Petitioners, vs. The United States. 1353.

To the Honorable, the United States Court of Customs Appeals: Your petitioners, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, respectfully pray that the said United States Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose pray that an order be entered requiring the said Board of Appraisers to return to said United States Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioners also pray for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, March 17th, 1914. R. B. Henry Co., Wiener Bros., Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., and J. Wile Sons & Co., Petitioners, by Comstock & Washburn, Attorneys, 12 Broadway, New York City, N. Y.

SCHEDULE A.

The following are the importations and entries covered by this proceeding, with the dates thereof, and with such other data as are convenient for purposes of identification:

Entry No.	Vessel.	Entered.	Protest No.
	R. B. Henry Co.		
282477	Louisiane	10/11/13	726867/34858
	Wiener Bros.		
317982	Kaiser Wilhelm II.	11/12/13	727395/36413
	Lehn & Fink.		
88849	Gr. Waldersee	10/17/13	727502/36412

Entry No.	Vessel.	Entered.	Protest No.
		W. A. Taylor & Co.	
277298	Europa	10/ 8/13	726470/33657
		J. S. Plummer & Co.	
278560	Ryndam	10/ 7/13	726808/33652
		Mecke & Co.	
211790	Banan	10/ 9/13	727394/35226
		J. Wile, Sons & Co.	
285279	Montserrat	10/15/13	726810/34095

SCHEDULE B.

The Board of United States General Appraisers has confirmed the action of the Collector of the Port in assessing and exacting duty on various merchandise imported into the United States and assessed with the rates of duty prescribed by the schedules and paragraphs of the dutiable list of Section I. of the Tariff Act of October 3, 1913, covered by protests 726867, 727395, 727502, 726470, 726808, 727394, and 726810, thereby making errors of law and fact;

1. In not holding that, as a matter of law, under Section IV, Paragraph J, Subsection 7 of the Tariff Act of October 3, 1913, a discount of five per centum on all duties imposed by said Act must be allowed on all goods, wares and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares merchandise so imported against the imposition of other or higher duties or charges than is imposed on goods, wares, and merchandise when imported in vessels of the United States.

2. In not holding that a discount of five per centum on the duties imposed on all the merchandise covered by this petition should be allowed by virtue of Section IV, Paragraph J, Subsection 7, or the proviso thereof, of the Tariff Act of October 3, 1913, and also by virtue of the favored nation provisions of the treaty or treaties concluded between the United States and the nation or country in whose vessel or vessels this merchandise was imported, or of which said merchandise was imported, or of which said merchandise was a produce or manufacture.

3. In holding that the merchandise covered by protest 726867, imported in a vessel of Austria-Hungary, was not entitled to a discount of five per centum on the duties imposed on said merchandise by the Tariff Act of October 3, 1913, or assessed by the Collector.

4. In not holding that said Section IV, Paragraph J, Subsection 7, of the Tariff Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes" and Articles III, and IV, of the Treaty of Commerce and

Navigation concluded August 27, 1829, between the United States and Austria-Hungary entitled the merchandise covered by protest 726867 to said discount of 5 per cent as claimed.

5. In holding that the merchandise covered by protests 727395 and 727502 imported in vessels of Germany or the Hanseatic Republics was not entitled to a discount of five per cent on the duties imposed on said merchandise by the Tariff Act of October 3, 1913, or assessed by the Collector.

6. In not holding that said Section IV, Paragraph J, Subsection 7, and Articles I, II, and III, of the treaty concluded December 20, 1827, between the United States of America and the Hanseatic Republics, or Articles II, III, IV, V, VIII and IX, of the treaty concluded May 1, 1828, between the United States and Prussia entitled the merchandise covered by said protests 727395 and 727502 to a discount of five per centum on the duties imposed on said merchandise by the Tariff Act of October 3, 1913, or assessed by the Collector.

7. In holding that the merchandise covered by protest 726470, imported in vessel of Italy, was not entitled to the aforesaid discount of five per centum.

8. In not holding that said Section IV, Paragraph J, Subsection 7, and Articles V and VI of the treaty concluded February 26, 1871, between the United States and Italy entitled the merchandise covered by said protest 726470 to the aforesaid discount of five per centum.

9. In holding that the merchandise covered by protest 726808 imported in a vessel of the Netherlands was not entitled to the aforesaid discount of five per centum.

10. In not holding that said Section IV, Paragraph J, Subsection 7, and Articles I and II of the treaty concluded August 26, 1852, between the United States and the Netherlands entitled the merchandise covered by protest 726808 to the said discount of five per centum as claimed.

11. In holding that the merchandise covered by protest 727394 imported in a vessel of Norway was not entitled to the said discount of 5 per centum as claimed.

12. In not holding that said Section IV, Paragraph J, Subsection 7, and Article III of the treaty concluded July 4, 1827, between the United States and Sweden and Norway entitled the merchandise covered by protest 727394 to the said discount of five per centum as claimed.

13. In holding that the merchandise covered by protest 726810 imported in a vessel of Spain was not entitled to the said discount of five per centum as claimed.

14. In not holding that said Section IV, Paragraph J, Subsection 7, and Article VIII of the treaty concluded July 3, 1902, between

the United States and Spain entitled the merchandise covered by protest 726810 to the said discount of five per centum as claimed.

15. In holding (despite the clauses in the various treaties concluded between the United States and Austria-Hungary, Germany, the Hanseatic Republics and Prussia, Italy, the Netherlands, Norway and Spain, "providing for specifically reciprocal favors * * * to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels"), that goods imported in vessels of such other country covered by the protests embraced in this appeal were nevertheless dutiable at a higher and not at the same rate of duty as goods brought into the United States in its own vessels.

16. In holding that the enforcement of this statute (Section IV, Paragraph J, Subsection 7, of the Tariff Act of October 3, 1913) did not compel a recognition of the right of treaty powers under the most favored nation clauses and most favored shipping clauses to the same concession or right extended to goods brought in in vessels subject to American registry, and in not holding to the contrary.

17. In holding that the non-allowance of said 5 per centum discount on the merchandise in controversy imported in vessels of Austria-Hungary, the German Empire, Italy, the Netherlands, Norway and Spain, in connection with the allowance of said five per centum discount on merchandise imported in American vessels, was not such a construction of said Section IV, Paragraph J, Subsection 7, as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

18. In not holding that the non-allowance of said five per centum discount on the merchandise in controversy imported in vessels of Austria-Hungary, the German Empire, Italy, the Netherlands, Norway and Spain, in connection with the allowance of said five per centum discount on merchandise imported in American vessels, was such a construction of said Section IV, Paragraph J, Subsection 7, as did abrogate or in some manner impair or affect the provisions of the treaties concluded between the United States and foreign nations, including Austria-Hungary, the Hanseatic Republics and Prussia, or Germany, Italy, the Netherlands, Norway and Spain.

19. In holding that the applicable provisions of the treaties in question between the United States and Austria-Hungary, the Hanseatic Republics, Prussia, Italy, the Netherlands, Norway and Spain were not self-executing but executory, and that they were "merely contracts, which address themselves to the legislative power;" and in not holding on the contrary that they were self-executing.

20. In holding that said applicable provisions of the treaties in question were not to be treated as the supreme law of the land, and that they were opposed to the spirit and letter of the Constitution, and in not holding to the contrary.

21. In holding that the question of the application of said treaty provisions was a political rather than a judicial one.

22. In holding that said treaty provisions, if deemed to be self-executing would invade the functions of the House of Representatives in originating revenue bills, or the constitutional privileges of Congress to lay and collect duties.

23. In failing to hold that the proviso of said Subsection 7, of Paragraph J, of Section IV, gave force and effect to said treaty provisions as fully and to all intents and purposes as if they had been enacted as laws, making them fully executed and enforcible in the courts, and requiring judicial tribunals to construe the treaties and the statute together and to avoid a construction which would deprive either of effect.

24. In overruling the protests relating to goods imported in foreign vessels.

25. In not sustaining the protests as to the goods here in question imported in foreign vessels.

26. In affirming the decisions of the Collector.

27. In not reversing the decisions of the Collector.

Endorsed: United States Court of Customs Appeals. Filed Mar. 19, 1914. Arthur B. Shelton, Clerk.

MANDATE.—Mandate issued March 19, 1914. Arthur B. Shelton, Clerk.

BOND.—Bond of Philip Comstock in the sum of twenty-five dollars approved by Marion De Vries, Associate Judge. Filed March 19, 1914.

RETURN OF THE BOARD.—United States of America. Board of United States General Appraisers, New York, ss: R. B. Henry Co., *et al.*, Appellants, vs. The United States, Appellee. Board's Protest Nos. 726827/ etc. Collector's Nos. 34858, etc. Suit No. 1353.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court, having by orders, dated the 19th day of March, 1914, required the Board to transmit

to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protest 726867/34858, with the report of the collector of customs thereon;

2. The other protests covered by the petition, with the reports thereon, enclosed herewith in a separate envelope;

3. A copy of the stipulation upon which the protests were submitted;

4. A copy of the Board's decision in question, G. A. 7540 (T. D. 34246).

Witness The Honorable Jerry B. Sullivan, President of the Board, this 1st day of April, A. D. 1914. D. P. Dutcher, Acting Chief Clerk. G. V. O. (Seal.) Five per cent discount.

PROTEST 726867/34858.—New York, Dec. 9, 1913.

Hon. Collector of Customs, Port of New York.

Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision assessing duty under the Tariff Act of October 3, 1913,

We claim:

A.

That, as a matter of law, under Section IV, Paragraph J, Subsection VII of the Tariff Act of October 3, 1913, a discount of five per centum on all duties imposed by said Act must be allowed on goods, wares and merchandise imported in vessels admitted to registration under the laws of the United States, regardless of the foreign port or country from which such vessels cleared or sailed.

B.

That, as a matter of law, under said tariff provision, said discount of five per centum must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares, and merchandise so imported against the imposition of other or higher duties or

charges than is imposed on goods, wares, and merchandise when imported in vessels of the United States. We cite as typical in this connection:

Articles III and IV of the treaties of Commerce and Navigation concluded August 27, 1829, between the United States of America and Austria Hungary.

Articles V, XI, and XII, of the treaty of Commerce and Navigation concluded March 8, 1875, between the United States of America and Belgium.

Articles IV and V of the treaty concluded December 12, 1846, between the United States of America and New Granada (Columbia).

Article III of the treaty concluded April 26, 1826, between the United States of America and Denmark.

Article II of the treaty concluded July 3, 1815, between the United States of America and Great Britain.

Article III of the treaty concluded December 22, 1837, between the United States of America and Greece.

Articles, I, II and III, of the treaty concluded December 20, 1827, between the United States of America and the Hanseatic Republics.

Articles V and VI of the treaty concluded February 26, 1871, between the United States of America and Italy.

Articles I and II of the treaty concluded August 26, 1852, between the United States of America and the Netherlands.

Article VIII of the treaty concluded July 3, 1902, between the United States of America and Spain.

Article III of the treaty concluded July 4, 1827, between the United States of America and Sweden and Norway.

We rely also on Articles I, II, III and VII, of the treaty concluded June 24, 1822, between the United States of America and France.

C.

We further claim that, as a matter of law, under the said tariff provision and by virtue also of treaty provisions such as are enumerated in Paragraph B of this document in effect guaranteeing against the imposition of discriminatory duties, a discount of five per centum on all duties must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has treaties guaranteeing most favored nation treatment, regardless of whether such treaties contain stipulations such as are recited in Paragraph B or not.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions, herein.

The excess is paid under compulsion, to obtain and retain possession of said merchandise or articles, and you and the government are held liable for the same, and a demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the above claims is hereby made. The marks and numbers below given are given under duress and without prejudice.

Entry No. 282477. Vessel, Louisiane. Entered, Oct. 11/13. Bond No. 80516. Liquidated, Dec. 1/13. Marks and Nos. various as per entries and invoices.

Respectfully, R. B. Henry Co., by Comstock & Washburn, Attorneys, Attorneys and Counsellors at Law, 12 Broadway, New York City.

Endorsed: Custom House, New York. Received Dec. 9, 1913.

REPORT OF THE COLLECTOR.—Dec. 17, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the Appraiser's return on the invoice at the appropriate rate applicable under the provisions of the Act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

Dudley Field Malone, Collector.

STIPULATION.—Copy. Board of U. S. General Appraisers. In the Matter of Protests 726811, etc., "Five Per Cent Discount."

It is hereby stipulated and agreed by and between counsel for the importers and the Assistant Attorney General for the United States that:

Protest 726867 covers an entry in the name of R. B. Henry Co. of goods, wares and merchandise imported in S. S. Louisiane, a vessel admitted to registration under the laws of Austro-Hungary.

Protest 726470 covers an entry in the name of W. A. Taylor & Co. of goods, wares and merchandise imported in S. S. Europa, a vessel admitted to registration under the laws of Italy.

Protest 727394 covers an entry in the name of Mecke & Co. of goods, wares and merchandise imported in S. S. Banan, a vessel admitted to registration under the laws of Norway.

Protest 726808 covers an entry in the name of J. S. Plummer & Co. of goods, wares and merchandise imported in S. S. Ryndam, a vessel admitted to registration under the laws of the Netherlands.

Protest No. 726810 covers an entry in the name of J. Wile Sons & Co. of goods, wares and merchandise imported in S. S. Montserrat, a vessel admitted to registration under the laws of Spain.

Protest 727502 covers an entry in the name of Lehn & Fink covering goods, wares and merchandise imported in S. S. Graf Waldersee, a vessel of the Hamburg-American Line, admitted to registration uder the laws of Germany.

Protest No. 727395 covers an entry in the name of Wiener Bros. of goods, wares and merchandise imported in S. S. Kaiser Wilhelm II, a vessel of the North German Lloyd Line, admitted to registration under the laws of Germany.

* * * * * * *

It is further stipulated that the beforementioned protests may be submitted for decision on the record.

Wm. L. Wemple, Assistant Attorney General.

Comstock & Washburn, Attorneys for the Importers.

Endorsed: United States Court of Customs Appeals. Filed Apr. 2, 1914. Arthur B. Shelton, Clerk.

PETITION.—United States Court of Customs Appeals. James Elliott & Co., *et al.*, Petitioners, vs. The United States. 1355.

To the Honorable, the United States Court of Customs Appeals: Your petitioners, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, respectfully pray that the said United States Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose pray that an order be entered requiring the said Board of Appraisers to return to said United States Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioners also pray for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, March 19, 1914. J. Elliott & Co., and Samstag & Hilder Bros., Petitioners, by Comstock & Washburn, Attorneys, 12 Broadway, New York City, N. Y.

SCHEDULE A.

The following are the importations and entries covered by this proceeding, with the dates thereof, and with such other data as are convenient for purposes of identification:

Date of Decision, Mar. 6/14.

Entry No.	Vessel.	Entered.	Protest No.
	J. Elliott & Co.		
190969	Adriatic	7/19/12	726469/33702
	Samstag & Hilder Bros.		
171739	Lapland	6/24/13	726816/33653

SCHEDULE B.

The Board of United States General Appraisers has confirmed the action of the Collector of the Port in assessing and exacting duty on various merchandise imported into the United States and assessed with the rates of duty prescribed by the schedules and paragraphs of the dutiable list of Section I., of the Tariff Act of October 3, 1913, covered by protests 726469 and 726816, thereby making errors of law and fact;

1. In not holding that, as a matter of law, under Section IV, Paragraph J, Subsection 7, of the Tariff Act of October 3, 1913, a discount of 5 per centum on all duties imposed by said Act must be allowed on all goods, wares and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares and merchandise so imported against the imposition of other or higher duties or charges than is imposed on goods, wares, and merchandise when imported in vessels of the United States.

2. In not holding that a discount of 5 per centum on the duties imposed on all the merchandise covered by this petition should be allowed by virtue of Section IV, Paragraph J, Subsection 7, or the proviso thereof, also Section III, Subsection S, and Section IV, Subsection Q, of the Tariff Act of October 3, 1913, and also by virtue of the favored nation provisions of the treaty or treaties concluded between the United States and the nation or country in whose vessel or vessels this merchandise was imported, or of which said merchandise was a produce or manufacture.

3. In holding the merchandise covered by protest 726469, imported in a vessel of Great Britain, was not entitled to a discount of 5 per centum ad valorem on the duties imposed on said merchandise by the Tariff Act of October 3, 1913, or assessed by the Collector.

4. In not holding that said Section IV, Paragraph J, Subsection 7, in connection with Section III, Subsection S, and Section IV, Subsection Q, of the Tariff Act of October 3, 1913, and Article II, of the treaty concluded July 30, 1815, between the United States and Great Britain, entitled the merchandise covered by protest 726469 to said discount of 5 per centum.

5. In holding that the merchandise covered by protest 726816, imported in a vessel of Belgium, was not entitled to a discount of 5 per centum on the duties imposed on said merchandise by the Tariff Act of October 3, 1913, or assessed by the Collector.

6. In not holding that said Section IV, Paragraph J, Subsection 7, in connection with Section III, Subsection S, and Section IV, Subsection Q, of the Tariff Act of October 3, 1913, and Articles V, XI, and XII, of the Treaty of Commerce and Navigation concluded March 8, 1875, between the United States and Belgium, entitled the merchandise covered by said protest 726816 to said discount of 5 per centum.

7. In holding that the benefit of said 5 per centum discount "was intended to be extended only to those ships which imported goods under the Law of 1913."

8. In not holding that when the withdrawal entries covered by this petition were made, claim and demand upon the Collector having been duly made that said discount of 5 per centum of the duties on such withdrawal entries should be allowed, the Collector's refusal to grant said allowance or discount of 5 per centum on the duties amounted to a reliquidation of said entries, in accordance with the principles laid down in T. D. 27036, and T. D. 27486, G. A. 6396; and the importers' time to protest began to run from the time of the Collector's refusal of their claim or demand for said 5 per centum discount or allowance.

9. In not holding that inasmuch as the rate and amount of duty assessable on the merchandise in controversy under the provisions of the Act of October 3, 1913, differed from the rate and amount of duty assessable under the provisions of the Act of August 5, 1909, coupled with the Collector's failure, neglect, or refusal, at the time of withdrawal, to reliquidate said entries under the terms and provisions of said Act of October 3, 1913, particularly Section III, Subsection S, and Section IV, Paragraph J, Subsection 7, and Paragraph Q, that such failure, neglect, or refusal on the part of the Collector amounted to a new decision or reliquidation (constructive or otherwise) against which these protests were properly made.

10. In not holding as a matter of law that merchandise like that here in question, entered previously to October 3, 1913, without

payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent had been issued, and withdrawn from warehouse subsequent to October 3, 1913, should be treated for all duty purposes and subjected to the same duties and to no other or higher duties upon entry or withdrawal thereof than merchandise imported on or subsequent to October 3, 1913.

11. In holding (despite the clauses in the various treaties concluded between the United States and Great Britain and Belgium, "providing for specifically reciprocal favors * * * to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels"), that goods imported in vessels of such other country covered by the protests embraced in this appeal were nevertheless dutiable at a higher and not at the same rate of duty as goods brought into the United States in its own vessels.

12. In holding that the enforcement of this statute (Section IV, Paragraph J, Subsection 7, of the Tariff Act of October 3, 1913) did not compel a recognition of the right of treaty powers under the most favored nation clauses and most favored shipping clauses to the same concession or right extended to goods brought in in vessels subject to American registry, and in not holding to the contrary.

13. In holding that the non-allowance of said 5 per centum discount on the merchandise in controversy imported in vessels of Great Britain and Belgium, in connection with the allowance of said 5 per centum discount on merchandise imported in American vessels, was not such a construction of said Section IV, Paragraph J, Subsection 7, as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

14. In not holding that the non-allowance of said 5 per centum discount on the merchandise in controversy, imported in vessels of Great Britain and Belgium, in connection with the allowance of said 5 per centum discount on merchandise imported in American vessels, was such a construction of said Section IV, Paragraph J, Subsection 7, as did abrogate or in same manner impair or affect the provisions of the treaties concluded between the United States and Great Britain and Belgium.

15. In holding that the applicable provisions of the treaties in question between the United States and Great Britain and Belgium were not self-executing but executory and that they were "merely contracts, which address themselves to the legislative power;" and in not holding on the contrary that they were self-executing.

16. In holding that said applicable provisions of the treaties in question were not to be treated as the supreme law of the land, and that they were opposed to the spirit and letter of the Constitution, and in not holding to the contrary.

17. In holding that the question of the application of said treaty provisions was a political rather than a judicial one.

18. In holding that said treaty provisions if deemed to be self-executing, would invade the functions of the House of Representatives in originating revenue bills, or the constitutional privileges of Congress to lay and collect duties.

19. In failing to hold that the proviso of said Subsection 7, of Paragraph J, of Section IV, gave force and effect to said treaty provisions as fully and to all intents and purposes as if they had been enacted as laws, making them fully executed and enforcible in the courts, and requiring judicial tribunals to construe the treaties and the statute together and to avoid a construction which would deprive either of effect.

20. In overruling the protests relating to goods imported in foreign vessels.

21. In not sustaining the protests covered by this petition.

22. In affirming the decisions of the Collector.

23. In not reversing the decisions of the Collector.

Endorsed: United States Court of Customs Appeals. Filed Mar. 20, 1914. Arthur B. Shelton, Clerk.

MANDATE.—Mandate issued March 20, 1914. Arthur B. Shelton, Clerk.

BOND.—Bond of Philip Comstock in the sum of twenty-five dollars approved by O. M. Barber, Associate Judge. Filed March 20, 1914.

RETURN OF THE BOARD.—United States of America. Board of United States General Appraisers, New York. ss: James Elliott & Co., *et al.*, Appellants, vs. The United States, Appellee. Board's Protest Nos. 726469, etc. Collector's Nos. 33702, etc. Suit No. 1355.

The petitioner, above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court, having by order, dated the 20th day of March, 1914, required the Board to transmit to said Court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protest 726469/33702, with the report of the collector of customs thereon;

2. Protest 726816/33653, enclosed herewith in a separate envelope;

3. A copy of the stipulation upon which the protests were submitted;

4. A copy of the Board's decision in question, G. A. 7540 (T. D. 34246).

Witness The Honorable Jerry B. Sullivan, President of the Board, this 1st day of April, A. D. 1914. D. P. Dutcher, Acting Chief Clerk. G. V. O. (Seal.) Five per cent discount.

PROTEST 726469/33702.—New York, Nov. 14, 1913.

Hon. Collector of Customs, Port of New York.

Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment and liquidation of duties and your decision assessing duty under the Tariff Act of October 3, 1913.

We claim:

A.

That, as a matter of law, under Section IV, paragraph J, Subsection VII, of the Tariff Act of October 3, 1913, a discount of five per centum on all duties imposed by said Act must be allowed on goods, wares and merchandise imported in vessels admitted to registration under the laws of the United States, regardless of the foreign port or country from which such vessels cleared or sailed.

B.

That, as a matter of law, under said tariff provision, said discount of five per centum must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares, and merchandise so imported against the imposition of other or higher duties or charges than is imposed on goods, wares, and merchandise when imported in vessels of the United States. We cite as typical in this connection.

Articles III and IV of the treaties of Commerce and Navigation concluded August 27, 1829, between the United States of America and Austria Hungary.

Articles V, XI, and XII, of the treaty of Commerce and Navigation concluded March 8, 1875, between the United States of America and Belgium.

Articles IV and V of the treaty concluded December 12, 1846, between the United States of America and New Granada (Columbia).

Article III of the treaty concluded April 26, 1826, between the United States of America and Denmark.

Article II of the treaty concluded July 3, 1815, between the United States of America and Great Britain.

Article III of the treaty concluded December 22, 1837, between the United States of America and Greece.

Articles I, II and III of the treaty concluded December 20, 1827, between the United States of America and the Hanseatic Republics.

Articles V and VI of the treaty concluded February 26, 1871, between the United States of America and Italy.

Articles I and II of the treaty concluded August 26, 1852, between the United States of America and the Netherlands.

Article VIII of the treaty concluded July 3, 1902, between the United States of America and Spain.

Article III of the treaty concluded July 4, 1827, between the United States of America and Sweden and Norway.

We rely also on Articles I, II, III and VII, of the treaty concluded June 24, 1822, between the United States of America and France.

C.

We further claim that, as a matter of law, under the said tariff provision and by virtue also of treaty provisions such as are enumerated in Paragraph B of this document in effect guaranteeing against the imposition of discriminatory duties, a discount of five per centum on all duties must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has treaties guaranteeing most favored nation treatment, regardless of whether such treaties contain stipulations such as are recited in Paragraph B or not.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions, herein.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and you and the government are held

liable for the same, and a demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the above claims is hereby made. The marks and numbers below given are given under duress and without prejudice.

Entry No. 190969. Vessel, Adriatic. Entered, Jul. 19/12. Bond No. 80394. Re-liquidated, Nov. 7/13. Marks and Nos., various as per entries and invoices.

Respectfully, J. Elliott & Co., by Comstock & Washburn, Attorneys, Attorneys and Counsellors at Law, 12 Broadway, New York City.

Endorsed: Custom House, New York. Received, Nov. 14, 1913.

REPORT OF THE COLLECTOR.—December 5, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The merchandise under protest was withdrawn and duty paid after October 3, 1913, and was accordingly assessed at the appropriate rate applicable under the provisions of the present tariff, without any deduction or discount being made by reason of the vessel's registry, Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

Dudley Field Malone, Collector.

STIPULATION.—Copy. Board of U. S. General Appraisers. In the Matter of Protests 726811, etc., "Five Per Cent Discount."

It is hereby stipulated and agreed by and between counsel for the importers and the Assistant Attorney General for the United States that:

* * * * * * *

Protest 726816 covers an entry in the name of Samstag & Hilder Bros. of goods, wares and merchandise withdrawn from warehouse subsequent to October 3, 1913, and liquidated under the Law of 1913, and imported per S. S. Lapland, a vessel admitted to registration under the laws of Belgium.

Protest 726469 covers an entry in the name of J. Elliott & Co. of goods, wares and merchandise withdrawn from warehouse subsequent to October 3, 1913, and liquidated under the Law of 1913 which, for the purposes of this case, may be deemed to be of the produce and manufacture of Great Britain, imported in S. S. Adriatic, a vessel admitted to registration under the laws of Great Britain.

It is further stipulated that the beforementioned protests may be submitted for decision on the record.

Wm. L. Wemple, Assistant Attorney General.

Comstock & Washburn, Attorneys for the Importers.

Endorsed: United States Court of Customs Appeals. Filed Apr. 2, 1914. Arthur B. Shelton, Clerk.

PETITION.—United States Court of Customs Appeals. United States, Appellant, v. J. Wile Sons & Co., Appellees. Petition for Review. No. 1391. Original.

To the Honorable, the United States Court of Customs Appeals: Your petitioner, being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said Board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied, are set forth in the annexed Assignment of Errors.

Dated, New York, N. Y., May 4, 1914. Wm. G. McAdoo, Secretary of the Treasury, Petitioner, by Wm. L. Wemple, Assistant Attorney General, Attorney for Appellant, 641 Washington Street, New York, N. Y.

ASSIGNMENT OF ERRORS. The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.
3. In not holding that the protests herein were insufficient.
4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

SCHEDULE A. Following are the importations and entries covered by this proceeding with such other data as are convenient for purpose of identification: Decided March 6, 1914, Port of New York. Protest No. 726811/34096. Vessel, Krooland. Entered, Oct. 17, 1913. Entry No. 288638.

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, Clerk.

MANDATE.—Mandate issued May 5, 1914. Arthur B. Shelton, Clerk.

NOTICE OF APPEARANCE.—1391. Law Offices of Comstock & Washburn, 12 Broadway, N. Y., May 9/14.

Arthur B. Shelton, Esq., Clerk, U. S. Court of Customs Appeals, Washington, D. C.

Dear Sir:—Will you please enter our appearance as attorneys for the appellees in Appeal No. 1391, United States vs. J. Wile Sons & Co.

Very Respectfully, Comstock & Washburn. H. J. R.

Endorsed: United States Court of Customs Appeals. Filed May 11, 1914. Arthur B. Shelton, Clerk.

RETURN OF THE BOARD.—United States of America. Board of United States General Appraisers, New York. ss: United States, Appellant, vs. J. Wile Sons & Co., Appellees. Board's Protest No. 726811. Collector's No. 34096. Suit No. 1391.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court, having by order, dated the 5th day of May, 1914, required the Board to transmit to said Court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question, with the report of the collector of customs thereon;

2. Copy of the stipulation upon which the protest was submitted;

3. Copy of the decision of the Board, G. A. 7540 (T. D. 34246).

Witness The Honorable Jerry B. Sullivan, President of the Board, this 15th day of May, A. D. 1914. D. P. Dutcher, Acting Chief Clerk. G. V. O. (Seal.) Five per cent discount.

PROTEST 726811/34096.—New York, Nov. 24, 1913.

Hon. Collector of Customs, Port of New York.

Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment and liquidation of duties, and your decision assessing duty under the Tariff Act of October 3, 1913.

We claim:

A.

That, as a matter of law, under Section IV, paragraph J, Subsection VII of the Tariff Act of October 3, 1913, a discount of five per centum on all duties imposed by said Act must be allowed on goods, wares and merchandise imported in vessels admitted to registration under the laws of the United States, regardless of the foreign port or country from which such vessels cleared or sailed.

B.

That, as a matter of law, under said tariff provision, said discount of five per centum must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares, and merchandise so imported against the imposition of other or higher duties or charges than is imposed on goods, wares, and merchandise when imported in vessels of the United States. We cite as typical in this connection.

Articles III and IV of the treaties of Commerce and Navigation concluded August 27, 1829, between the United States of America and Austria Hungary.

Articles V, XI, and XII, of the treaty of Commerce and Navigation concluded March 8, 1875, between the United States of America and Belgium.

Articles IV and V of the treaty concluded December 12, 1846, between the United States of America and New Granada (Columbia).

Article III of the treaty concluded April 26, 1826, between the United States of America and Denmark.

Article II of the treaty concluded July 3, 1815, between the United States of America and Great Britain.

Article III of the treaty concluded December 22, 1837, between the United States of America and Greece.

Articles I, II and III, of the treaty concluded December 20, 1827, between the United States of America and the Hanseatic Republics.

Articles V and VI of the treaty concluded February 26, 1871, between the United States of America and Italy.

Articles I and II of the treaty concluded August 26, 1852, between the United States of America and the Netherlands.

Article VIII of the treaty concluded July 3, 1902, between the United States of America and Spain.

Article III of the treaty concluded July 4, 1827, between the United States of America and Sweden and Norway.

We rely also on Articles I, II, III and VII, of the treaty concluded June 24, 1822, between the United States of America and France.

C.

We further claim that, as a matter of law, under the said tariff provision and by virtue also of treaty provisions such as are enumerated in Paragraph B of this document in effect guaranteeing against the imposition of discriminatory duties, a discount of five per centum on all duties must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has treaties guaranteeing most favored nation treatment, regardless of whether such treaties contain stipulations such as are recited in Paragraph B or not.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions, herein.

The excess is paid under compulsion, to obtain and retain possession of said merchandise or articles, and you and the government are held liable for the same, and a demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the above claims is hereby made. The marks and numbers below given are given under duress and without prejudice.

Entry No. 288638. Vessel, Kroonland. Entered, Oct. 17/13. Bond No. 80927. Liquidated, Nov. 21/13. Marks and Nos., various as per entries and invoices.

Respectfully, J. Wile Sons & Co., by Comstock & Washburn, Attorneys, Attorneys and Counselors at Law, 12 Broadway, New York City.

Endorsed: Custom House, New York. Received Nov. 24, 1913.

REPORT OF THE COLLECTOR.—December 12, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the Appraiser's return on the invoice at the appropriate rate applicable under the provisions of the Act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

Dudley Field Malone, Collector.

STIPULATION.—(Copy). Board of U. S. General Appraisers. In the Matter of Protests 726811, etc., "Five Per cent Discount."

It is hereby stipulated and agreed by and between counsel for the importers and the Assistant Attorney General for the United States that:

Protest 726811 covers an entry in the name of J. Wile Sons & Co. of goods, wares and merchandise imported in S. S. Kroonland, a vessel admitted to registration under the laws of the United States.

* * * * * * *

It is further stipulated that the beforementioned protests may be submitted for decision on the record.

Wm. L. Wemple, Assistant Attorney General.

Comstock & Washburn, Attorneys for the Importers.

DECISION OF THE BOARD.—(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, 726811, etc., of J. Elliott & Co., J. Wile Sons & Co., *et al.*, against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, *General Appraiser:* The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

"The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clause"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal countesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37), the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government.

They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion,

to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country. (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)"

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate *ex proprio vigore*. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court. [Italics are ours.]"

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force, and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the *specific* provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party,

so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which

it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entred into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, *supra*, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of

marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, *et seq.*).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 *et seq.*). Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which *imported* goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof."

As we read the statute, subsection 7 does not *impose* a duty; it *grants a reduction* for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

Byron S. Waite, H. M. Somerville, Eugene G. Hay, Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS APPEALS.

R. B. HENRY CO., ET AL.
v.
THE UNITED STATES. } No. 1353.

Certificate of the Attorney General.

In pursuance of the Act entitled "An Act to amend section 195 of the Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1353, R. B. Henry Co., et al v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914.
United States Court of Customs Appeals.

ARTHUR B. SHELTON, *Clerk.*

UNITED STATES COURT OF CUSTOMS APPEALS

JAMES ELLIOTT & CO., ET AL.
v.
THE UNITED STATES, } No. 1355.

Certificate of the Attorney General

In pursuance of the Act entitled "An Act to amend section 195 of the Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1355, James Elliott & Co., et al v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914.
United States Court of Customs Appeals,

ARTHUR B. SHELTON,
Clerk.

UNITED STATES COURT OF CUSTOMS APPEALS

THE UNITED STATES,
v.
J. WILE SONS & CO. } No. 1391.

Certificate of the Attorney General

In pursuance of the Act entitled "An Act to amend section 19 of the Act entitled 'An Act to codify, revise and amend the law relating to the judiciary, approved March 3, 1911," approved August 22, 1914. I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1391, The United States v. J. Wile Sons & Company," is of such importance as to render expedient its review by the Supreme Court.

Given under by hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals.
ARTHUR B. SHELTON,
Clerk.

UNITED STATES COURT OF CUSTOMS APPEALS.

R. B. HENRY CO., WIENER BROTHERS, LEHN & FINK, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., Appellants,
vs.
THE UNITED STATES, APPELLEE. } No. 1353.

J. ELLIOTT & CO., SAMSTAG & HILDER BROTHERS, Appellants,
vs.
THE UNITED STATES, APPELLEE. } No. 1355.

THE UNITED STATES, APPELLANT,
vs.
J. WILE SONS & CO., APPELLEE. } No. 1391.

The above entitled appeals were argued by counsel and taken under advisement by the court on November 10, 11 and 12, 1914.

UNITED STATES COURT OF CUSTOMS APPEALS

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present the Honorable Robert M. Montgomery, Presiding Judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries and George E. Martin, Associate Judges.

The court was opened for business in due form.

The M. H. Pulaski Co.,
Johnson & Faulkner,
John Pullman & Co.,
Appellants,
No. 1346.
v.
The United States,
Appellee.

R. B. Henry Co.,
Wiener Brothers,
Lehn & Fink,
W. A. Taylor & Co.,
J. S. Plummer & Co.,
Mecke & Co.,
J. Wile Sons & Co.,
Appellants,
No. 1353.
v.
The United States,
Appellee.

J. Elliott & Co.,
Samstag & Hilder Brothers,
Appellants,
No. 1355.
v.
The United States,
Appellee.

Robert Muller & Co.,
Appellant,
No. 1364.
v.
The United States,
Appellee,

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said Board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took

Wood & Selick,
Louis Meyer & Son,
Appellants,
No. 1370.

v.

The United States,
Appellee.

The United States,
Appellant,
No. 1391.

v.

J. Wile Sons & Co.,
Appellee.

The United States,
Appellant,
No. 1392.

v.

G. W. Faber, Inc.,
Appellee.

The United States,
Appellant,
No. 1393.

v.

Louis Meyers & Sons,
Appellee.

The United States,
Appellant,
No. 1394.

v.

William Openhym & Sons,
A. Wimpfheimer & Bro.,
Appellees.

The United States,
Appellant,
No. 1395.

v.

Park & Tilford,
Appellee.

The United States,
Appellant,
No. 1396.

v.

Selgas & Co.,
Appellee.

effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said Board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importation the decision of said Board is hereby affirmed.

And said appeals are remanded to said Board for proper action in the premises.

De Vries, Associate Judge, dissents.

E. La Montagne's Sons,
Appellants,
No. 1399.

v.

The United States,
Appellee.

Cullman Brothers,
E. Rosenwald & Bro.,
Appellants,
No. 1410.

v.

The United States,
Appellee.

A. Lorsch & Co.,
Henry Glass & Co.,
F. L. Kraemer & Co.,
L. D. Bloch & Co.,
A. Leipzig Inc.,
A. J. Dale,
Appellants,
No. 1440.

v.

The United States,
Appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

United States Court of Customs Appeals.

THE M. H. PULASKI CO. ET AL. *v.* UNITED STATES (No. 1346). R. B. HENRY CO. ET AL. *v.* UNITED STATES (No. 1353). J. ELLIOTT & CO. ET AL. *v.* UNITED STATES (No. 1355). ROBERT MULLER & CO. *v.* UNITED STATES (No. 1364). WOOD & SELICK ET AL *v.* UNITED STATES (No. 1370). UNITED STATES *v.* J. WILE, SONS & CO. (No. 1391). UNITED STATES *v.* G. W. FABER, INC., (No. 1392). UNITED STATES *v.* LOUIS MEYERS & SONS (No. 1393). UNITED STATES *v.* WILLIAM OPENHYM & SONS ET AL. (No. 1394). UNITED STATES *v.* PARK & TILFORD (No. 1395). UNITED STATES *v.* SELGAS & CO. (No. 1396). E. LA MONTAGNE'S SONS *v.* UNITED STATES (No. 1399). CULLMAN BROTHERS ET AL. *v.* UNITED STATES (No. 1410). A. LORSCH & CO. ET AL. *v.* UNITED STATES (No. 1440).

APPEALS FROM BOARD OF UNITED STATES GENERAL APPRAISERS.

(Affirmed in part, reversed in part.)

BARBER, Judge, delivered the opinion of the court.

MONTGOMERY, SMITH, and MARTIN, JJ., concur; DE VRIES, J., dissents.

These cases, some fourteen in number, are generally known as the "Five Per Cent Cases." Some of them involve one only and others more than one of the various issues. Numerous counsel for the litigating parties and an *amicus curiæ* have filed briefs and made full oral arguments, all of which have been carefully considered by the court.

The importance of these cases has not been overlooked, and we are indebted to the eminent counsel who have so ably and fully presented their respective views and the authorities supporting the same.

While the names of the importers in each case are given in the caption of the opinion, it is not thought necessary to refer specifically thereto hereinafter, as our decision upon the issues involved will readily suggest the disposition to be made of each individual case.

The tariff act of 1913, approved by the President October 3, provided in the enacting clause thereof as follows:

That on and after the day following the passage of this act, except as otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed, namely:

Thereinafter numerous paragraphs fixing rates of duty follow.

Near the end of the act are found the following provisions, under Section IV:

B. That nothing in this act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the act of Congress heretofore passed for the execution of the same, except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed.

J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Q. That on and after the day when this act shall go into effect all goods, wares, and merchandise previously imported for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose for which no permit of delivery to the importer or his agent has been issued shall be subjected to the duties imposed by this act and to no other duty, upon the entry or withdrawal thereof. * * *

Section 3 of the act in a subparagraph provides as follows:

S. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal. * * *

On divers dates after said tariff act took effect certain merchandise was imported into the United States in various vessels, all of which, at the time the importations were made, were registered either under the laws of the United States or under the laws of some foreign nation between which and the United States there were, at the time the act went into effect and at the time of such importations, certain treaties commonly entitled treaties of "commerce and navigation" and sometimes of "friendship, commerce, and navigation."

The important question here is, Was the merchandise so imported entitled to the benefit of the 5 per cent discount referred to in said J, subsection 7?

It is apparent that this question may be divided into two parts.

The first part will relate wholly to merchandise imported in vessels admitted to registration under the laws of the United States.

The second will relate wholly to merchandise imported in vessels registered under the laws of any one of the foreign-treaty nations, above referred to, and if these treaties are all of the same legal import and like relevant conditions attended each importation it follows that a determination of the dutiable status of the merchandise imported in the vessels of one of such nations will determine the like status of that imported in the vessels of any other thereof.

A related and dependent question also arises from the fact that some of the merchandise was brought into the United States shortly before the act of 1913 took effect and entered without payment of duty and under bond for warehousing pursuant to law. This merchandise was, after the act took effect, withdrawn from bonded warehouse, entered for consumption, the duty thereon paid, and delivery permit therefor issued. The question is whether or not, in view of the fact that this merchandise was so imported before the act took effect, the 5 per cent discount can be allowed thereon. This merchandise is also of two classes—one, that imported in vessels of United States registry, and the other, that imported in vessels of said treaty nations.

There are in addition special questions as to certain merchandise imported, after the act of 1913 took effect, from Cuba in ships of United States registry; also questions raised by the Board of General Appraisers as to the character and constitutionality of certain treaty stipulations.

All these will be later stated and considered.

The Board of General Appraisers held in all cases that the merchandise imported in vessels of United States registry *after* the act of 1913 took effect was entitled to the 5 per cent discount mentioned in J, subsection 7. As to such decisions, the Government is the appellant here.

In all cases where the merchandise was imported in vessels of foreign registry, the board held that it was not entitled to the benefit of that discount. As to such decisions, the importers are the appellants.

In all cases where the merchandise was under bond for warehousing on the date when the act of 1913 took effect, the board held that it was not entitled to the 5 per cent discount. As to such decisions, the importers are the appellants.

The nations between which and the United States the treaties already referred to were outstanding at the time the tariff act of 1913 took effect, and the dates when the respective treaty ratifications were exchanged, are as follows:

Great Britain, December 22, 1815, indefinitely extended August 2, 1827.

Norway and Sweden, January 18, 1828.

German Empire: Hanseatic Republics, June 2, 1828; Prussia, March 14, 1829; Hanover, November 14, 1840; Mecklenburg-Schwerin, May 20, 1828.

Austria-Hungary, February 10, 1831.

Netherlands, February 25, 1853.

Italy, November 18, 1871.

Belgium, June 11, 1875.

Japan, March 21, 1895.

Spain, April 14, 1903.

(See Malloy's Treaties, Conventions, etc., between the United States and other powers, published under the authority of the Senate in 1910, vols. 1 and 2.)

Some of these treaties relate to divers subjects, but all contain provisions touching commercial relations between the high contracting parties. Each contains reciprocal provisions, some limited with reference to the place of the origin of the merchandise and others not so, providing in substance that merchandise imported in the vessels of the one party into the ports of the other shall not be charged a higher or other rate of duty than such other party charges on the like merchandise when imported therein in its own vessels.

For convenience, these provisions will be herein referred to as reciprocal commercial provisions. As substantially a typical illustration of such a provision, Article V of the Italian treaty is here quoted:

> The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy in its own vessels may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and they further agree that whatever may be lawfully exported and reexported from the one country, in its own vessels, to any foreign country, may in the like manner be exported or reexported in the vessels of the other country, and the same bounties, duties, and drawbacks shall be allowed and collected, whether such exportation or reexportation be made in vessels of the United States or of Italy.

In the treaty with Great Britain this reciprocal commercial provision is limited to the importation into the United States of articles which are "the growth, produce, or manufacture of his Britannick Majesty's territories in Europe," and reciprocally to the importation "into the territories of his Britannick Majesty in Europe of any articles the growth, produce, or manufacture of the United States."

These reciprocal commercial provisions are couched in differing phraseology in the various treaties, but an examination thereof satisfies us that in legal effect they are the same so far as regards the merchandise to which they relate. We understand all parties here agree to this conclusion.

Respecting the treaty with Norway, which is involved in some of these cases, it may be noted that the treaty was in fact made with Norway and Sweden when under the same government. We treat the matter as if this treaty had been made between Norway and the United States. Such is the claim of both the Government and the importers. Indeed, we understand the treaty has been so regarded by the United States, and that it is so regarded by Norway may be concluded, as the Government points out in its brief, from the communication addressed to our Secretary of State from the Norwegian legation under date of November 7, 1905. (See Malloy's Treaties, Conventions, etc., vol. 2, p. 1300.)

It may with propriety also be observed here that as to the treaties referred to under the title of "German Empire" it is agreed that although made between the United States and what are now different parts of the German Nation they are all treated as and conceded to be in force. That they have likewise in other cases been so regarded is indicated by the decisions in Terlinden *v.* Ames, 184 U. S., 270, and Disconto Gesellschaft *v.* Umbreit, 208 U. S., 570.

What is generally known as the "favored-nation clause" is also to be found in some of these treaties. More especial reference thereto will be made hereafter.

At the outset the Government unqualifiedly concedes that the said reciprocal commercial provisions are effective and in force as the law of the land, and that by virtue thereof any discount that may be legally allowed to merchandise imported in vessels of United States registry must also be allowed to the like merchandise when imported in vessels of the foreign-treaty nations—that is, if it is allowed to merchandise imported in our vessels, it can not be denied to like merchandise imported in said foreign vessels without violating said reciprocal commercial provisions. It also concedes that it is within the jurisdiction of the judiciary to consider and construe said reciprocal provisions.

Thus far the Government and importers are in accord.

The Government, however, insists, because of the fact that if the discount is allowed to merchandise imported in our vessels and denied to that imported in such foreign vessels, said reciprocal commercial provisions will be violated; that J, subsection 7, when construed in the light of its legislative history, precludes the allowance at the present time of the discount to any merchandise.

Stated in the language of its brief, the Government's claim is:

> In other words, so long as treaties between the United States and foreign nations, containing provisions that the vessels of such foreign nations shall be treated upon the same footing as vessels of the United States, are in effect, the right to the discount is postponed and can not accrue, because it is expressly provided that the allowing of the discount shall not "in any manner impair or affect the provisions" of any such treaty; and, therefore, it is a *condition precedent* to the giving of a discount that no such treaty provision shall be impaired or affected in any manner.

Upon oral argument the able Assistant Attorney General stated his claim in substance and effect to be that the subsection as a whole should be regarded as the declaration of a policy, which may or may not some time be adopted, but which is not by the subsection enacted into law now in force, although conditions may arise in the future, for instance if and when all the treaties in question shall have been denounced, when effect may be given thereto as affirmative law.

All the importers challenge the correctness of the Government's interpretation of the subsection, and claim that under applicable canons of construction it must be held that the subsection is operative *in præsenti*. Some go further and undertake to show by shipping statistics contained in certain public reports and documents that the amount of imported tonnage to which the 5 per cent discount can not be allowed is so great that there will result a substantial discrimination in favor of our merchant marine.

The Government meets this last claim of importers by undertaking to show from the same statistics that such discrimination will be so small as to be practically negligible, which fact, it argues, strongly supports its contention that the operation of the subsection must be postponed.

It is obvious, if the Government's contentions are sound, that the 5 per cent discount can not be allowed in any of these cases, and we therefore proceed to consider them.

Preliminary thereto certain rules of statutory construction may profitably be adverted to.

It will be presumed that the lawmaking body will not do a vain thing, and that it intends that its acts and every part of them are valid and capable of being carried into effect. (Lewis's Sutherland Statutory Construction, sec. 497.)

All statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless. (Lewis's Sutherland Statutory Construction, sec. 498.)

Bird *v.* United States, 187 U. S., 118.

Bernier *v.* Bernier, 147 U. S., 242.

Louisville Water Co. *v.* Clark, 143 U. S., 1.

Market Company *v.* Hoffman, 101 U. S., 112.
Platt *v.* Railroad Company, 99 U. S., 48.

As to provisos, one rule is that "the exception of a particular thing from the operation of the general words of a statute shows that in the opinion of the lawmaker the thing excepted would be within the general words had not the exception been made." (Lewis' Sutherland Statutory Construction, sec. 351.) Another is that a proviso should not be so construed as to be plainly repugnant to the body of the section.

Greely *v.* Thompson, 10 How. (51 U. S.), 225, 236.
Savings Bank *v.* United States, 19 Wall. (86 U. S.), 227.
Sonneborn Sons *v.* United States, 1 Ct. Cust. Apls., 443.
Minis *v.* United States, 15 Peters (40 U. S.), 421.
Interstate Commerce Com. *v.* Baird, 194 U. S., 25, 36.

There is also another well-settled rule, which is that if the language employed in a statute is free from ambiguity and doubt and plainly, clearly, and distinctly expresses the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. The statute itself furnishes the best means of its own exposition. (Lewis' Sutherland Statutory Construction, sec. 366, and cases cited.)

The force and application of these rules will be kept in mind in the discussion.

Considered in the light thereof it almost seems that J, subsection 7, requires no critical analysis to ascertain its meaning. It declares that "a discount of 5 per cent on all duties imposed by this act shall be allowed on such * * * merchandise as shall be imported in vessels admitted to registration under the laws of the United States." There is nothing in this language that is ambiguous as to the *time* when it shall take effect. The discount *shall be allowed*. The enacting clause of the tariff law provides that "on and after the day following the passage of this act" the duties prescribed therein "shall be levied, collected, and paid." These provisions of the enacting clause and the subsection are equally explicit and, plainly, together they declare that the prescribed duties when ascertained shall, so far as relates to merchandise imported in vessels of our registry, be diminished by the discount of 5 per cent from what otherwise would be chargeable thereon. The right to the discount attaches at the same instant that the liability to the normal duty accrues. There is no language that suspends or defers it unless it may be found in the proviso. We do not find it there. It simply declares that nothing in the subsection shall be construed "to abrogate or in any manner impair or affect the provisions of any treaty."

The law is well settled that Congress may by statute abrogate a treaty previously made by the United States with another nation.

United States *v.* Lee Yen Tai, 185 U. S., 213, 220, and cases cited.
Sanchez *v.* United States, 216 U. S., 167.
Rainey *v.* United States, 232 U. S., 310.
American Express Co. *v.* U. S., 4 Ct. Cust. Appls., 146.

And this may be accomplished either by legislation expressly directed to that end or that which by *necessary* implication so results.

The effect of the subsection, were it not for the proviso, therefore, would have been, as is agreed, to affect, impair, or abrogate the reciprocal commercial treaty provisions, and the effect of the proviso is to preserve and save the rights granted in such reciprocal provisions. So far as the *language* of the proviso is concerned, there is no indication that it was thereby intended to suspend or defer the operation and effect of the subsection as a whole. The time when the discount is to be allowed is provided in the first part of the subsection, and is the time when the liability to the duty accrues, but the quantity of merchandise to which it applies is enlarged by the proviso.

We think the discussion of this question might well conclude here, but the Government with great zeal and earnestness presses the claim that if the legislative history of the statute be considered a contrary conclusion will be compelled, and out of regard to this and to the importance of these cases we give the subject further examination. It is fruitless, however, to discuss at much length what would have been the effect of the section as enacted by the House. It is not denied that it would have contravened or repealed the treaties. Such a result is manifestly what the Congress undertook to prevent.

As first enacted in the House of Representatives and sent to the Senate as a part of the tariff bill the subsection was identical with that as first quoted in this opinion with the proviso omitted. The Ways and Means Committee of the House reported to that body that this subsection was "a discrimination in favor of American shipping similar to the provisions of some of the first tariff bills enacted by Congress," and, in substance, further that under like legislation the merchant marine of the United States in the past had been largely developed and it was believed by again adopting the policy of discrimination that the upbuilding of a merchant fleet would again be promoted and the money kept at home which is now being paid to foreign vessels to carry our products to foreign markets. (See p. 52 of report of Ways and Means Committee to accompany H. R. 3321.) In ensuing debate the House had its attention specifically called to the claim that the subsection contravened the provisions of 20 or more commercial treaties, or, if not so, that it extended the 5 per cent discount to merchandise imported in the registered vessels of the treaty nations; and also to the fact that there were only a limited number of maritime nations with which we had no such treaty. (50 Cong. Rec., pt. 2, pp. 1345–1358.)

This provision became the subject of examination and discussion in the Senate. The Finance Committee in reporting the bill to that

body stated it had stricken out this subsection, for which action it gave the following explanation:

> The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had the treaties. In our opinion it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover, the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were therefore not only inviting an endless retaliation but a retaliation where our opponents would have had in nearly every case the better of it, and in many cases infinitely the better. (50 Cong. Rec., pt. 3, p. 2515.)

During the consideration of subsection 7, as it came from the House, a substitute therefor was offered in the Senate, providing in substance that dutiable merchandise imported in vessels not built or registered under the laws of the United States should pay a duty of 10 per cent ad valorem in addition to the duties otherwise imposed by the act, and if the goods were free, an ad valorem duty of 5 per cent thereon, with a proviso directing the President without unnecessary delay to cause to be abrogated all treaties contravening said substitute amendment, and that until so abrogated the proposed statute should not apply to merchandise imported in vessels affected by such treaties.

This amendment was rejected by the Senate. (50 Cong. Rec., pt. 5, pp. 4494, 4548.)

Thereupon another amendment was offered restricting the provisions of the subsection, as it came from the House, to "vessels built in the United States or admitted to registration prior to the passage of this act under the laws of the United States," with a proviso "that the President is directed to cause to be abrogated without unnecessary delay and in the manner therein provided all treaties which contravene this provision, and until so abrogated this provision shall not apply to goods, wares, and merchandise imported in vessels affected by such treaties." This, too, was rejected.

Shortly thereafter the entire subsection as it came from the House was stricken from the bill by a "yea-and-nay" vote upon the question as to whether the Senate would concur with its previous action as in the Committee of the Whole striking out the subsection. (50 Cong. Rec., pt. 5, p. 4548.)

The bill as passed by the Senate and returned to the House contained neither the subsection nor any equivalent.

While the bill was before the Senate the President transmitted thereto, in response to its request made to the Secretary of State, cer-

tain documents. Among the same was a letter dated May 26, 1913, to the last-named official from the Secretary of the Treasury. Therein attention was called to J, subsection 7, concerning which the Secretary of the Treasury wrote:

It has been pointed out to me, directly and indirectly, that this provision may result in the violation of many of our treaties with foreign nations and is almost sure to result in international complications and diplomatic negotiations. Consequently, I earnestly suggest the advisability of submitting to the counselor for the State Department, or such other officer as you may deem proper, the question as to whether or not this provision is in violation of any existing treaty rights.

Apparently this suggestion was at once acted upon, and the letter of Hon. John Bassett Moore, counselor for the Department of State, answering this letter of the Secretary of the Treasury, was also transmitted by the President to the Senate. That letter we reproduce here:

DEPARTMENT OF STATE,
Washington, May 28, 1913.

THE SECRETARY OF THE TREASURY.

SIR: Replying to your letter of the 26th instant, in which you request an expression of the opinion of the department as to whether subsection 7, paragraph J, of section 4 of the pending tariff bill (H. R. 3321) conflicts with the provisions of our treaties, I have the honor to say:

The clause in question reads as follows:

"J. Subsection 7. That a discount of 5 per cent on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States."

We have treaties with numerous countries, including the Argentine Republic, Austria-Hungary, Belgium, Colombia, Costa Rica, Denmark, Great Britain, the Hanseatic Republics, Italy, Japan, the Netherlands, Norway, Prussia, Spain, and Sweden, which provide, in one form or another, that neither contracting party shall charge a lower rate of duty on merchandise imported in its own vessels than it charges on merchandise imported in vessels of the other contracting party.

The earliest of these treaties now in force is that with Great Britain, concluded July 3, 1815, during the administration of Madison. It contains (art. 2) the following clause:

"The same duties shall be paid on the importation into the United States of any articles the growth, produce, or manufacture of His Britannic Majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of His Britannic Majesty's territories in Europe of any article the growth, produce, or manufacture of the United States, whether such importation shall be in British vessels or in vessels of the United States."

The convention of commerce and navigation with Denmark, concluded April 26, 1826, during the administration of John Quincy Adams, contains (art. 3) the following clause:

"They (the contracting parties) likewise agree that whatever kind of produce, manufacture, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in vessels belonging wholly to the

citizens thereof, may be also imported in vessels wholly belonging to the subjects of Denmark; and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other."

Following this passage there is a reciprocal provision as to importations in American vessels into Denmark.

Substantially similar stipulations may be found in Article III of the treaty of commerce and navigation with Sweden and Norway, concluded July 4, 1827.

Article III of the treaty of commerce and navigation with Prussia, concluded May 1, 1828, contains the following stipulation: "All kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the Kingdom of Prussia, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States, may also be so imported in Prussian vessels without paying other or higher duties or charges of whatever kind or denomination levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America."

The article contains a reciprocal provision as to importations into Prussia in American vessels.

Similar clauses exist in the treaty of commerce and navigation between the United States and Austria-Hungary, concluded August 27, 1829.

The convention of commerce and navigation between the United States and the Netherlands, concluded August 26, 1852, contains the following article:

"ARTICLE 1. Goods and merchandise, whatever their origin may be, imported into or exported from the ports of the United States from and to any other country in vessels of the Netherlands, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels. Reciprocally goods and merchandise, whatever their origin may be, imported into or exported from the ports of the Netherlands from and to any other country in vessels of the United States shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels."

The treaty of commerce and navigation with the Argentine Republic, concluded July 27, 1853, briefly provides as follows:

"ART. 6. The same duties shall be paid and the same drawbacks and bounties allowed upon the importation and exportation of any article into or from the territories of the United States or into or from the territories of the Argentine Confederation, whether such importation or exportation be made in vessels of the United States or in vessels of the Argentine Confederation."

It will be observed that article 6 above quoted refers to drawbacks and bounties. Similar stipulations are found in other treaties.

The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels. Governments having treaty stipulations with the United States, such as those above quoted, probably would not object to the discount if it were extended, in conformity with those stipulations, to merchandise imported into the United States in their respective vessels; but they would not acquiesce in a discriminatory levy of lower duties on goods imported into the United States in American registered vessels because it was called a discount. It is the fact that a lower duty is charged, and not the term

by which the reduction is described, with which the department is obliged to deal.

The department has received one communication from a Government with which we have at present no such treaty stipulations as those above quoted. This communication proceeds from the Government of France, whose ambassador at this Capital has made to the department with reference to the subsection in question the following statement:

"This is tantamount to what was formerly styled the 'flag surtax' that was given up because, as every nation availed itself of it, there was no advantage in maintaining a system that was bringing inconvenience to all and profit to none. If such clause were enacted, reciprocal measures would unfailingly be taken. The French administration would have no choice in the matter, since it would be bound to act upon article 6 of the law of May 19, 1866, which directs the levying of countervailing duties on the vessels of any Government which, to the detriment of our own marine, adopts a system of duties or taxes from which its own is exempt."

I have the honor to be, sir,

Your obedient servant,

J. B. Moore, *Counselor.*
(For the Secretary of State.)

(50 Cong. Rec., pt. 5, p. 4237.)

In due course the bill was sent to a conference committee and action there had, which resulted in placing in the bill the subsection in the language found in the statute. In returning its report to the House this committee stated that subsection 7 was amended by the conference "to provide that nothing in this section should be so construed as to abrogate or affect the provisions of any treaty with any foreign country." The corresponding report to the Senate was that the original subsection had been restored and the proviso added. (50 Cong. Rec., pt. 6, pp. 5229, 5311.)

Before the bill was enacted into law a letter from the solicitor of the Department of State, Mr. Joseph W. Folk, to Senator Simmons, chairman of the Finance Committee, was incorporated into the Record, in which the writer expressed views as to the effect of J, subsection 7, that are in accord with those entertained by Counselor Moore. (50 Cong. Rec., p. 5345.)

It would seem from these letters that both the counselor and the solicitor understood that there was no reciprocal commercial provision in the outstanding French treaty, and that the latter also understood that the treaties with certain former independent German States, now constituting parts of the German Empire, were regarded by this country, as well as the Empire, as being still in effect.

The foregoing history of J, subsection 7, clearly demonstrates that the House in the first instance thereby undertook to discriminate in favor of our vessels, apparently without particular regard to the effect thereof upon treaties and treaty rights. The executive departments charged with the duty of looking after our relations with foreign countries and the collection of customs duties, whether under statutes or treaties, or both, became apprehensive that certain treaties

would thereby be violated and international complications ensue. To prevent these obviously deplorable results the matter was brought to the attention of Congress in the manner already indicated. The Senate thereupon being satisfied that the proposed subsection would violate numerous treaties, among them those involved here, and that international complications would follow, insisted upon an amendment which would, while preserving the original design of the House, so far as consistent with treaty rights it could be preserved, nevertheless absolutely forbid such a construction or application thereof as would bring about a realization of the fears of the State and Treasury Departments, which amendment was adopted. It was never, so far as we can learn, in debate or otherwise, suggested that the subsection would not take effect coincidently with the rest of the act.

Summing up the matter it may well be concluded that the proviso to the subsection is the concurring answer of Congress to the objections so made to the subsection as proposed by the House and its declaration that no treaty should thereby be violated, all of which was accomplished in the manner suggested by Counselor Moore; that is, by extending the discount in conformity with the treaty stipulations to merchandise imported in the registered vessels of such nations. Thereby all international complications, otherwise sure to arise, were avoided, and also thereby scope was given for the operation of the plan of encouraging our merchant marine.

The Government really urges that the subsection should be construed as if the proviso thereto read as follows:

> *Provided, however,* That this subsection shall not become effective or be construed as in force so long as, if given force and effect, it impairs or affects or invades the provisions of any treaty between the United States and any foreign country.

But, as already pointed out, we think the language necessary to give the subsection this construction is not to be found therein, and it is not claimed to exist elsewhere. Standing alone it does not suggest that the subsection was not intended to take effect *in præsenti.* By the two amendments to the subsection as proposed in the Senate that body was asked to provide for the abrogation of these treaties and in the meantime to withhold the discount from the merchandise imported in vessels of the treaty nations, both of which it refused to do.

We think the irresistible inference to be drawn from this action of the Senate upon the question of amending J, subsection 7, is that it did not intend that the subsection as a whole should be suspended so long as these outstanding treaties remained in force. Clearly, too, the House could not, in view of what already appears, have understood that the subsection would not take effect *in præsenti.* As first

enacted in that body it was designed to be in force when the bill became law, and the conference committee reported to the House not that the operation of the subsection was to be deferred until the conflicting treaties were abrogated, but that it should be so construed as not to abrogate or affect any such treaty.

If doubt can still remain as to whether the subsection was intended to take effect *in praesenti*, its meaning may be further tested in the following manner. Suppose at the date of its enactment the only treaty in force containing the reciprocal commercial provision had been the one with Spain, and the proviso to the subsection had read, instead of as now:

Provided, That nothing in this subsection contained shall be so construed as to abrogate or in any manner impair or affect the treaty with Spain, ratifications of which were exchanged April 14, 1903.

If this had been the proviso, can it be doubted that the true meaning and intent of the subsection could be readily determined if the reciprocal commercial provision in the Spanish treaty were inserted in the proviso in the following manner:

Provided, That nothing in this subsection contained shall be so construed as to abrogate or in any manner impair or affect Article VIII of the treaty with Spain, which provides "that all the articles which are or may be legally imported from foreign countries into ports of the United States, in United States vessels, may likewise be imported into those ports in Spanish vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels."

Would anyone, under such circumstances, claim that the discount affirmatively and expressly given to goods imported in vessels of our registry must or could lawfully be refused so long as the Spanish treaty remained in force? We think the clear intent would be that the discount should be allowed to merchandise imported in the vessels of both nations and not that it should be denied to all merchandise until the Spanish treaty was abrogated.

Of course, if this be the sound conclusion as to the Spanish treaty, it applies equally to all the others.

It is clear to us that J, subsection 7, as a whole was intended to make a present discrimination of 5 per cent in favor of merchandise imported in vessels of United States registry. The construction claimed by the Government defeats that purpose not only for the present but, so far as we know, for all time.

It is clear that Congress assumed, as it was advised, that there were outstanding treaties, some provisions of which would be violated and in effect abrogated by the subsection as first enacted by the House. We think it is equally clear that by the proviso it intended, as it declared, that the first part of the subsection should not be *construed* to abrogate these treaties or impair any rights thereunder. The natural force and legal effect of the first part, unmodified, would have

been to abrogate or repeal some part of each thereof, and so, to give force and effect to the saving language of the proviso, it must be *construed*—i. e., *held*—that the treaties are not impaired or abrogated by the first part of the subsection, but are in force. The only way to enforce them is to hold that they are effective to prevent discrimination against merchandise imported in the vessels of the treaty nations. The only way to give force and effect to the first part of the subsection is to allow now the discount to merchandise imported in vessels of our registry.

By this conclusion not only do we give force and effect to all the language of the subsection and hold that the proviso is not repugnant to the body thereof but we also acquit Congress of the charge of having in form enacted a statute which, although clothed in language apt for present enforcement as to all its parts, was, nevertheless, not designed as a statute at all, but was in reality no more than the declaration of a policy.

But it is thought that the word "affect" contained in the proviso, when correctly interpreted, renders untenable the conclusion we have reached. Without undertaking to consider *seriatim* the views presented, it is sufficient for our purpose to say that the word "affect" is recognized as susceptible of more than one meaning, and that the sense in which it is used must be determined by the context as well as the purpose of the statute or other instrument in which it is found.

In Ryan *v.* Carter (93 U. S., 78), there was considered an enactment by Congress, declaring that the rights, titles, and claims to certain lands—

shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights of common thereto: *Provided*, That nothing herein contained shall be construed to affect the rights of any person claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to lands in the said Territory—

it was urged that the force of the word "affect" in this proviso was to exclude from the beneficial purpose of the act the title of a particular individual to certain of the named lands the title to which had been by the commissioners confirmed to him. The court said the confirmation of the title in question became complete and vested in the named person a legal title, valid against the United States and all persons

unless his case was taken out of the enacting clause by the proviso that the act shall not *affect* any confirmed claims to the same lands. How "affect" them? If in the sense of simply acting upon them, then his title is excepted from the operation of the act. But this exception is not within the reason of the proviso, and the court is at liberty to adopt another construction, if it may be fairly done, by giving full and just effect to the words used. * * * It is unnecessary to give the various definitions of the word "affect." It is enough

to say that it is often used in the sense of acting injuriously upon persons and things and in this sense we are all of opinion it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso.

In Tyler *v.* Wells (2 Mo. Appls., 526), the court reviewed certain acts of Congress evidently designed to confirm certain land titles and which contained provisos that nothing therein should "be construed to affect or impair the rights of any individual," or that nothing herein contained "shall be construed to affect the rights of any person claiming the land." That is, in some of the statutes the words "affect or impair" were used in conjunction and in others the word "affect" only was employed. The court said, "undoubtedly a party may be beneficially affected, as well as injuriously affected by anything, and the word 'affect' standing alone may be said to be equivocal"; that is, as we understand, it might be said to mean to affect injuriously or to affect beneficially. It was held that the context and the purpose of the enactment both consistently required that whether standing alone or in conjunction with the word "impair" the word "affect" should in the case before the court be read in the sense of "to affect injuriously."

In Baird *v.* St. Louis Hospital Asso. (116 Mo. Rep., 419) a similar question arose, and again the court said the term "affect the rights of" standing alone in a proviso, in view of the object and purpose of the act, to settle land titles, meant to prejudice or injuriously affect.

The case of Lyons *v.* Elston (211 Mass., 478) was a suit in equity by some of the children of a grantor to set aside her deed of real estate to others of her children. The master found that the defendant and one of the plaintiffs—

connived together to induce their mother to make a will in their favor * * * and that she was unduly influenced by them, and that although she of her own volition and with the idea of preventing trouble, which might be occasioned if she left another will, suggested a deed instead, was nevertheless affected at said time by said undue influence.

The question was whether the word "affected" so used in said finding should be interpreted to mean that the grantor was unduly influenced in the making of the deed. There was no dispute as to the meaning of the word "affected" as used, and the court found that the undue influence which was used to cause the grantor to make a will operated to influence her in making the deed in question. Manifestly this was a conclusion that the undue influence operated injuriously to the rights of the orator in the case.

In Clark *v.* Riddle (101 Iowa, 270) the question was whether the provisions of the special city charter of Cedar Rapids were in anywise limited or enlarged by a general statute known as the mulct law which applied to all cities of over 5,000 inhabitants and contained

various provisions touching the sale of intoxicating liquors not granted to that city in its special charter. There was a statute providing that no general law relating to cities organized under the general incorporation act should *affect* cities organized under special charters unless special reference to such cities was made therein. The court found that the mulct law, if applicable, would permit the city to authorize the sale of intoxicating liquors therein, which under its special charter it could not do, and in other respects would enlarge its rights and duties, and held that the provision that a general law should not *affect* a special city charter prohibited the enlargement of the charter in question by the mulct law which did not specially refer to Cedar Rapids. We see nothing in this manifestly sound conclusion that is at variance with the meaning we give to the word "affect" in this case.

Other authorities of the same import may be cited, but it is thought the above sufficiently show what can not be denied, that the meaning to be ascribed to the word "affect" can only be determined in view of its context and the purpose to be accomplished by the statute in which it is employed.

The purpose of the proviso here without doubt was to prevent the abrogation or repeal of treaties, including those in question, and it is, we think, apparent that the intent of Congress (and this has already been pointed out) was to declare that the granting of the discount to merchandise imported in vessels of our registry should not in any way abrogate or impair—which, of course, means to wipe out or injuriously affect—such treaties or rights thereunder; and in that sense we think both reason and authority require the interpretation of the word "affect" here. Its use in conjunction with the word "impair" suggests that interpretation.

It is suggested that the Congress intended that J, subsection 7, should take effect when the interfering treaties had been abrogated by the ratification of substitutes therefor. The Senate, however, had expressly refused to provide for the orderly abrogation of these treaties, as we have already shown.

Congress did not provide therefor, and, as it is primarily clothed with the power so to do, the suggested construction is that it enacted a statute to become operative only upon the termination of treaties which it did not denounce itself and for which it made no provision.

Again, it is said, Section IV, A, of the act of 1913 in connection with J, subsection 7, should be interpreted to mean that the President, through diplomatic channels, would cause to be abrogated the offending treaties and that thereupon the provisions for the discount to American shipping would have vitality. Section IV, A, does not authorize the abrogation of any treaty, but does authorize and empower the President "to negotiate trade agreements with foreign

nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce." The treaties under consideration here seem to be precisely of that class, and it is somewhat difficult to believe that by this provision Congress indicated any purpose or expectation that thereunder such existing treaties would be abrogated or terminated. No such results, so far as we can ascertain, have followed the provisions of similar statutes. (See tariff act of 1897, sec. 3.)

It is true that the vitality and force of an act may be made to depend upon a condition to be determined outside the halls of legislation. But such conditions, so far as we can learn, are not left to conjecture, but are definitely stated and the mode of their ascertainment, and announcement if any, distinctly provided for. (Field v. Clark, 143 U. S., 649, 680, and cases there discussed.)

At the most the only inference to be drawn from Section IV, A, is that Congress recognized the wisdom of the policy of commercial reciprocity, desired its continuance, and the execution of trade agreements to promote the same.

By providing, however, that any agreements so negotiated by the President should be submitted to it for ratification before becoming effective, Congress, if the claimed view thereof be adopted, gave notice that J, subsection 7, should not take effect until it had further legislated. How easy and simple for Congress, if it intended to suspend the operation of the subsection, to have so expressly declared, instead of submerging that intent in a manner that renders it impossible of easy discovery and when found appears to be neither satisfactory nor certain.

The logic of the interpretation contended for forces its supporters to the conclusion, and admittedly it is required, that so long as any one of the treaties in question is outstanding the subsection is not operative and no merchandise, whether imported from treaty or nontreaty nations, can receive the discount even if imported in vessels of our registry. A construction which leads to that result manifestly is at war with the rule that a proviso shall not be held to defeat the purview of a statute unless it can be given no other interpretation.

One further suggestion and we have done with this phase of the discussion. It is said that we have failed to give proper effect to the rule that the law-making body will not be presumed to have done a vain thing and have violated the canon that the construction given to the proviso shall not be repugnant to the main body of the statute. As we have already pointed out, it seems to us clear that the intent of Congress was to give present effect to the law providing for the discount, because only thereby can present benefits accrue to our merchant marine. And, indeed, it would be a vain

thing for Congress to solemnly declare its purpose to benefit our shipping, enact an appropriate statute to produce that result, and then say after all that the result was defeated by the further terms of the act which are nevertheless naturally susceptible of a construction that can give full force and immediate effect thereto. In this view we have construed the proviso conformably to recognized authority. It was said by Mr. Justice Field in Georgia Railroad and Banking Company *v.* Smith, 128 U. S., 174, that—

> The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "provided," so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences.

Upon the scope, office, purpose, and interpretation of provisos there are many judicial pronouncements. Their value in any case depends upon the precise question decided or under consideration. The purpose of the court is always to reach a correct understanding of the legislative intent and all canons of construction are designed to promote that end. Of itself a proviso possesses no magical power. In the subsection before us there is found a general enactment providing for a discount of 5 per cent upon certain merchandise to which is added the proviso that nothing therein shall be construed to abrogate or in any manner impair or affect any treaty provisions. The proviso does not suggest that no discount whatever shall be allowed until the happening of certain conditions, but clearly indicates that its allowance shall not be construed to affect treaty rights. The treaties referred to provide that merchandise that may be lawfully imported here in our vessels may also be imported in the vessels of the treaty nations, and that there shall be levied and collected no higher or other duties upon merchandise imported in the one class than in the other. Force is given the purview and the proviso by the construction we have adopted and we have no hesitation in expressing the view that it clearly carries out the legislative intent.

We have not overlooked the case of Dunlap *v.* United States (173 U. S., 65), which is much relied upon by the Government. The Supreme Court there considered section 61 of the act of August 28, 1894, which we quote:

> Any manufacturer finding it necessary to use alcohol in the arts or in any medicinal or other like compound may use the same under regulations to be prescribed by the Secretary of the Treasury, and on satisfying the collector of internal revenue for the district wherein he resides or carries on business that

he has complied with such regulations and has used such alcohol therein and exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the Treasury of the United States a rebate or repayment of the tax so paid.

The Secretary of the Treasury made no regulations whatever applicable to the subject matter of this section. A manufacturer sought to recover through the Court of Claims repayment of taxes on alcohol used by him subsequently to the enactment of the statute.

Sustaining the Court of Claims, the Supreme Court held that recovery could not be had. It said the section was one of many relating to taxation of distilled spirits which imposed a higher tax thereon and introduced certain new requirements in regard to re-gauging, etc., the object being to derive more revenue from spirits used as beverages; that—

the general intention to forego the revenue that had been previously derived from spirits used in the arts could only be carried out in consistency with the general tenor of the whole body of laws regulating the tax on distilled spirits, which undertook to guard the revenue at all points, and which required from the officers of the Government evidence that everything had been correctly done. The regulations contemplated by section 61 were regulations to insure the *bona fide* use in the arts, etc., of all alcohol on which a rebate was to be paid and to prevent such payment on alcohol not so used, and these were to be specific regulations under that section, and could not otherwise be framed than in the exercise of a large discretion based on years of experience in the Treasury Department. * * * It seems clear that when Congress undertook to provide for refunding the tax on alcohol when used in the arts it manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite, and may reasonably be held to have left it to the Secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required. It is true that the right to the rebate was derived from the statute, but it was the statute itself which postponed the existence of the right until the Secretary had prescribed regulations, if he found it practicable to do so.

While recognizing the rule that debates are not appropriate sources of information from which to discover the meaning of statutes, the court observed that it was interesting to note that in the Senate upon an effort to amend the bill and prior to the insertion of section 61 therein it was said in support of the section that—

If the Secretary of the Treasury and the Commissioner of Internal Revenue think they can not adopt any regulations which will prevent fraud, then nothing will be done under it; but if they conclude they can adopt such regulations as will prevent fraud in the use of alcohol in the manufactures and the arts, then there will be relief under it. (26 Cong. Rec., p. 6985.)

It appeared that as soon as the act became law, without the approval of the President, Congress adjourned; that at its first meeting thereafter the Secretary of the Treasury reported a draft of the regulations he desired to prescribe, stating that their enforcement would cost half a million dollars annually for which no appropria-

tion was available, and, therefore, he could not execute the section until Congress took further action; that notwithstanding this information no such action was taken, and finally, in June, 1896, the section was repealed.

Reviewing the question, the court noted the fact that upon such repeal a committee was authorized to consider all questions relating to the use of alcohol in manufactures and arts free of tax. It queried if the Secretary of the Treasury under the circumstances could have been compelled by mandamus to prescribe regulations under the section, in view of the nonaction of Congress upon his report. Considering the claim that by reason of the fact that the exercise of discretionary power was necessarily involved in prescribing the contemplated regulations, mandamus would not lie, the court said:

> We think the argument entitled to great weight, and that it demonstrates the intention of Congress to leave the entire matter to the Treasury Department to ascertain what would be needed in order to carry the section into effect. Nothing could have been further from the mind of Congress than that repayment must be made on the unregulated use of alcohol in the arts, if in the judgment of the department, as the matter stood, such use could not be regulated. * * * That this was not the case of a right granted *in præsenti* to all persons who might, after the passage of the law, actually use alcohol in the arts, or in any medicinal or other like compounds, to a rebate or repayment of the tax paid on such alcohol, but that the grant of the right was conditioned on use in compliance with regulations to be prescribed, in the absence of which the right could not vest so as to create a cause of action by reason of the unregulated use.

We are clear that giving to this case full authority upon the precise question decided it is not controlling here. In effect it held that the statute before it, and which it found subject to such interpretation, delegated to another branch of government the determination of whether and when regulations could or should be made to give it effect, and treated such regulations as conditions precedent to any right of recovery or action for repayment thereunder.

The statute before us does not warrant such interpretation. There is no suggestion that before it becomes operative the action of any other department of government must intervene. Its language speaks only in terms of the present, and to hold that it was not intended to take effect *in præsenti* is to impute to Congress an attempt "to keep the word of promise to the ear and break it to the hope."

There still remains in this connection to be considered the argument that the smallness of the discrimination in favor of American shipping which would result from the construction hereinbefore given to the subsection demonstrates the error of our conclusion. Upon that question no evidence was introduced before the board. Counsel for all parties here rely, as the foundation for their claims in this regard, upon statistics compiled by the Department of Com-

merce with reference to shipping and found in a report entitled "Commerce and navigation of the United States for the year ending June 30, 1913." These statistics show what the respective briefs assume, and we treat the same as relevant, because such is the attitude of all parties with reference thereto, as we understand. The Solicitor for the State Department, Mr. Folk, in his aforesaid letter pointed out that there were no treaty obligations with certain nations which would be infringed by the proposed discount. These nations seem to be Brazil, Chile, China, Dominican Republic, Portugal, Russia, Guatemala, Haiti, Mexico, Nicaragua, Panama, Persia, Peru, Salvador, Siam, Switzerland, Turkey, Uruguay, and Venezuela, and counsel on both sides so assume.

From the statistics referred to it appears that for the year 1913 the merchandise brought into this country by the registered vessels of the below nations was of the following tonnage amounts.

	Tons.	Vessels
Brazil	17,462	7
Dominican Republic	1,679	12
Mexico	33,253	71
Panama	2,164	9
Portugal	4,474	5
Russia	114,578	31
Uruguay	1,866	2
Venezuela	887	5
Making an aggregate of	175,363	142

It is agreed that merchandise imported in the vessels of the countries above named would not be entitled to the 5 per cent discount. There is a disagreement whether merchandise imported in vessels of French registration would be entitled to this discount, the Government claiming it would and the importers insisting that it would not.

The preamble of the French treaty, which was concluded in 1822, recites that it is deemed to be temporary. It contains no favored-nation clause. The only provisions as to commercial reciprocal treatment are found in Articles I, II, and III.

Articles I and II provide that the products of the United States imported in its vessels into France shall pay not exceeding certain specified additional duties above those paid on like articles also produced in the United States when imported into France in French vessels, with an identical reciprocal provision as to French products imported into the United States in French vessels.

Article III of said treaty provides that no discriminating duties shall be levied on such products by either country when imported for transit or reexportation.

Article VII provides that the temporary convention shall be in force for two years, and even after the expiration of that term until

a definitive treaty has been concluded or until the temporary convention has been renounced by either party, and in the absence of such renouncement that the extra duties mentioned in Articles I and II shall, after the two years have expired, be annually diminished one-fourth of their amount. (Malloys Treaties, Conventions, etc., Vol. I, p. 521.)

It is agreed that this treaty has not been renounced.

The Government upon this state of facts assumes that products of France imported into this country in French vessels would be entitled to the discount, but for the purposes of this case we do not so construe the treaty. Articles I and II have by reason of the provisions of Article VII long since expired by their own limitations, and there are no applicable reciprocal provisions in the French treaty now in force except those specified in Article III.

Nothing appears in the case to show that the French treaty is regarded by this Government otherwise than as we conclude, and support for this conclusion is found in the aforesaid letters of Counselor Moore and Solicitor Folk.

From the same statistics it appears that during the year ending June 30, 1913, there were imported into this country from France in 243 French vessels 980,628 tons of merchandise.

The importers claim that merchandise brought into this country in ships of British registry which is not the growth or produce of British territories in Europe is not entitled to the 5 per cent discount. The reciprocal commercial provisions of the British treaty are limited to the products of its European possessions, and it contains no general favored-nation clause.

From the same statistics it appears that the total amount of merchandise imported in some 8,998 British vessels for the year 1913 was over 16,000,000 tons. It also appears that from the British possessions in Europe during the same period there were imported some over 5,000,000 tons, but in vessels of what nationality does not appear, although it may be presumed it was largely in vessels of British registry. Of course, the British direct trade from its European possessions with this country could be no more than this amount. Counsel for importers deduct this amount from the total tonnage, leaving a net tonnage of British ships, of merchandise not the product of British European possessions, of more than 11,000,000 tons brought here in some 7,935 vessels, and claim that such merchandise, if imported since October 3, 1913, would not be entitled to the 5 per cent discount.

An exact ascertainment of the quantity of merchandise imported into this country in British vessels to which the 5 per cent discount could not be allowed should not perhaps be attempted without some

examination of what are called the favored-nation clauses which are found in some, but not all, of the treaties. An illustration thereof from the treaty with Prussia is here inserted:

ARTICLE IX. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional.

Another is taken from the treaty with Mecklenburg-Schwerin:

ARTICLE VII. The high contracting parties engage mutually not to grant any particular favor to other nations in respect of navigation and duties of customs which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing a compensation as near as possible if the concession was conditional.

The Government claims that in view of these favored-nation clauses the claim of the importers is grossly exaggerated as to the amount of tonnage imported in vessels of British registry to which the discount could not be given. It points, for instance, to the Servian treaty, which is not directly involved in the cases before us, but which in Article VI thereof provides that each of the high contracting parties binds itself with reference to the amount, guaranty, and collection of duties on imports and exports—

to give to the other the advantage of every favor, privilege, or diminution in the tariffs on the import or export of the articles mentioned or not in the present convention that it shall have granted to a third power; also every favor or immunity which shall be later granted to a third power shall be immediately extended and without consideration, and by this very fact to the other contracting party.

The Government claims that Servian goods brought into the United States in British ships must necessarily enjoy the same favor or immunity as the products of Great Britain in Europe are entitled to receive when brought into this country in British ships, and that the same right attaches to the merchandise of many other treaty nations. It further claims that thereby the amount of merchandise imported in British vessels, although not the product of European British possessions which will not be entitled to the discount, will be so diminished as not perhaps to be worthy of consideration.

The importers reply to this by saying that the Government misconceives the situation; that the effect of J, subsection 7, is to divide all merchandise imported in foreign bottoms into two classes which are, respectively, given or denied the discount, depending upon whether the importing vessel is or is not privileged by treaty—in other words, that the discrimination relates primarily to the *means or instrumentality of transit* and not to the products; that all products imported in privileged vessels are entitled to the discount and all products not so imported are denied it; that if a nation like Servia

chooses to ship its products into the United States in vessels of a nation not entitled under its treaty to the 5 per cent discount, the favored-nation clause in the Servian treaty does not render the discount applicable. This contention is enlarged upon and fully discussed.

We do not undertake to determine this legal question.

If we hold with the Government, there is nothing before us from which we can determine with reasonable approximation the amount of such tonnage to which the discount would attach. It is, we think, clear that some of it would not be entitled to the discount. For instance, that which comes in vessels of British registry from countries whose treaties have neither the reciprocal commercial provisions nor the favored-nation clauses therein, and also from countries with which we have no commercial treaties whatever, for we think it may be said of common knowledge, as the Government argues, that British ships "are every-day sights in almost every harbor of the world."

The conceded shipping statistics first stated herein show that in the year ending June 30, 1913, the following importations were made in vessels of nations with which we have no commercial treaties:

	Tons.	Vessels.
Brazil	17,462	7
Mexico	32,253	71
Russia	114,578	31
Total	164,293	109

The same statistics show that during that period the total importations from these countries in foreign vessels were as follows:

	Tons.	Vessels.
Brazil	433,515	149
Mexico	1,173,711	693
Russia	191,004	57
Total	1,798,230	899

We do not think it unreasonable to assume that no small part of the difference between these two amounts—1,633,937 tons—reached our ports in British bottoms.

It is assumed by counsel for both parties that the total tonnage imported in foreign vessels was for the year ending June 30, 1913, 27,501,410 tons in 13,473 vessels, and importers contend that of this more than 12,000,000 tons, brought in more than 8,000 vessels, were not protected by treaty guarantee.

We do not think it is necessary to determine precisely how this may be. It does appear without controversy that 175,363 tons

brought in 142 vessels were not so protected, and we hold that the French shipments of 980,628 tons in 243 vessels are in the same class, making an aggregate of 1,155,901 tons in 384 vessels. We have no doubt this amount should be largely increased by the tonnage imported in British vessels.

Under these circumstances can we say that the operation of J, subsection 7, must be suspended because its purpose is not accomplished?

In discussing this question it must be remembered that Congress has not seen fit to specify that any definite amount of merchandise must appear to be disentitled to the 5 per cent discount before the subsection becomes of force, and that the real benefit of the discount depends not only upon the tonnage but also upon the value of the importations, concerning which latter feature no argument is made and no information offered.

Congress will be presumed to know the facts material to the consideration of this question. Hence it knew when the statute was enacted what benefits would accrue therefrom to our merchant marine, and what might be expected was actually called to its attention. (Cong. Record, vol. 50, pp. 1345–1358.) The enactment of the subsection was the adoption of a policy of discrimination in favor of our vessels. The wisdom or expediency of that policy is a matter into which we may not inquire nor have we the right to suspend the operation of the statute because we may think its purpose is not adequately accomplished.

McCulloch *v.* State of Maryland, 4 Wheaton, 316, 423.
Providence Bank *v.* Billings, 4 Peters, 514, 563.
United States *v.* Union Pacific R. R. Co., 91 U. S., 72.
Folsom *v.* United States, 160 U. S., 121.
United States *v.* Freight Association, 166 U. S., 290, 340.
Texas R. Co. *v.* Abilene Cotton Oil Co., 204 U. S., 426, 447.
Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S., 238, 245.
Field *v.* Clark, 143 U. S., 649.

By the enactment of the statute Congress has indicated that in its opinion there would be a sufficient amount and value of imported merchandise to which the discount would not attach to accomplish its purpose, or at least to try the policy embodied in the new law. It was mindful of the high duty cast upon it to avoid an arbitrary abrogation, without notice, of outstanding treaties, and it would ill become us to say, at least until it is clearly shown that practically no benefits accrue to our shipping thereby, that the present enforcement of the statute shall not be permitted. The law has regard for the future as well as for the present, and who can say what benefits

may later flow from the continued enforcement of the law as it is written. Whenever the legislative body discovers its purpose is not adequately accomplished it will doubtless apply a remedy, but that is its exclusive prerogative.

There is another reason why it should not be held that the quantity of merchandise to be affected by the 5 per cent discount of J, subsection 7, is so small that immediate effect should not be given thereto.

J, subsection 1, provides—

> That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which, being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States. * * *

The effect of this provision is, of course, a discrimination in favor of merchandise imported in vessels of our registry, resulting, it is plain, in a discrimination in favor of such vessels. The *quantity* of merchandise receiving the benefit, however, must be substantially identical with the *quantity* which would receive the benefit of the 5 per cent discount under J, subsection 7. By the enactment of J, subsection 1, Congress indicated that it did not deem that quantity so small as to be negligible for the purposes of that subsection, and it can hardly be claimed that subsection is not operative *in præsenti*.

The provision for the assessment of a duty of 10 per cent ad valorem in addition to the then normal tariff rates upon merchandise not imported in vessels of our registry is not new law. It was enacted at least as far back as 1816, if not before. (3 Stat., 310, sec. 3, p. 313.) It has been reenacted in practically if not all general tariff acts ever since. Such reenactments have, we think, always contained (with perhaps one exception) a proviso that the additional duty should not apply to merchandise imported in vessels not of our registry, entitled by *treaty* or by any act of Congress to be imported here on the payment of the same duties as were then imposed upon the like merchandise when imported in our vessels. That these provisos related directly to such treaty stipulations as we are considering is obvious.

During all this time such provisos appear to have been recognized and construed as of then present force and effect. Customs Regulations, 1857, Chapter IX, also articles 303, 940, and 972; Customs Regu-

lations, 1908, articles 91 and 1055. See also intervening Customs Regulations of 1874, 1884, 1892, and 1899; also T. D. 18915, and the opinion of Justice McKenna, then Attorney General, T. D. 18431.

If for the purpose of assessing the 10 per cent additional discriminating duty for nearly a century and now Congress has not deemed and now does not deem the quantity of merchandise affected thereby so small as to be negligible, how can it be said that the same quantity thereof is negligible for the kindred purposes of J, subsection 7? If sufficient for one purpose it must be so regarded for the other.

We conclude that nothing has been shown which warrants us in holding that J, subsection 7, is not now in force and effect.

As already stated, certain merchandise was brought into this country prior to the enactment of the present tariff law, was placed in bonded warehouse without the then payment of any duty thereon pursuant to the law then in force, and was, after the act of 1913 took effect, withdrawn from such warehouses, the duty paid thereon, the delivery permits therefor issued, and the merchandise itself entered for consumption in this country. Some of this merchandise was imported in vessels of our registry and some in the registered vessels of one or more of the aforesaid treaty nations.

The Board of General Appraisers held that the 5 per cent discount must be denied to all such merchandise, and as to such decisions the importers are appellants.

The language of J, subsection 7, that the discount shall not be allowed on such merchandise "as shall be imported in vessels, etc.," which was held by the board to relate wholly to merchandise thereafterwards brought to this country must be construed in connection with subsection Q, before herein quoted, which provides that on and after the day when the act shall go into effect merchandise previously imported for which no entry has been made, and merchandise previously entered without payment of duty and under bond for warehousing for which no permit of delivery to the importer or his agent has been isued, shall be subject to the duties imposed by this act and to no other duty upon the entry or withdrawal thereof.

As to the duty to be imposed, without regard to the allowance of the 5 per cent discount, it is clear that construed together these subsections require the imposition of duties under the act of 1913. Such is also the meaning of Section III, sub-paragraph S, already quoted.

The purpose of tariff laws, generally speaking, is to provide that the dutiable status of imported merchandise is to be determined at the time it enters into the commerce of the country. Clearly, with respect to the class of merchandise now under consideration, that

time was when entry for consumption was made and delivery permits issued.

Marriott *v.* Brune, 9 Howard (50 U. S.), 619.
Fabbri *v.* Murphy, 95 U. S., 191.
Hartranft *v.* Oliver, 125 U. S., 525.
United States *v.* Burr, 159 U. S., 78, 83–84.
United States *v.* American Sugar Co., 202 U. S., 563.
Franklin Sugar Co. *v.* U. S., 202 U. S., 580.
Faber *v.* United States, 221 U. S., 649.
United States *v.* Goodsell, 84 Fed. Rep., 439.
Mosle *v.* Bidwell, 130 Fed. Rep., 334.
United States *v.* Hartwell, 142 Fed. Rep., 434.
American Cigar Co. *v.* U. S., 146 Fed. Rep., 484.
Gump *v.* United States, 3 Ct. Cust. Appls., 137.

Now, while J, subsection 7, without reference to subsections Q and S, relates to duties on merchandise *thereafterwards imported*, we think when taken together these provisions should be construed to include merchandise brought here before the passage of the act, under bond for warehousing but which thereafter is entered for consumption. So long as merchandise remains under bond for warehousing in the tariff sense and for assessment of duties, its importation has not been completed. Indeed, it may never be completed; hence warehoused goods are for tariff purposes future importations. (See cases last above cited.)

Nor do we think the fact that J, subsection 7, provides for a *discount* from the otherwise normal duties of the act affects the question, as it simply means that regard must be had to the instrumentality of importation in fixing the amount; that is, the duties to be paid. The policy of the law, as we have seen, is to allow this discount if the merchandise is imported in vessels of our registry, and we think full effect is given thereto, and can only be given by allowing this merchandise to receive that discount. In this way only can all merchandise imported and entered for consumption under the act be given the equality of treatment contemplated by the subsection.

In some of the cases before us tobacco and cigars, the product of the soil or industry of Cuba, were imported in vessels of our registry after the tariff act of 1913 took effect, and the question is, What reduction from the rates of duty thereon, as provided by the act of 1913, shall be allowed?

The determination of this question requires an examination of the Cuban treaty which must be construed in connection with J, subsection 7, and section IV, paragraph B, quoted in the first part of this opinion. The materiality of paragraph B is that it declares that nothing in the act shall be construed to abrogate, impair, or affect

the provisions of the Cuban treaty or the act of Congress to execute the same, and that the proviso of Article VIII of said treaty is thereby declared abrogated and repealed.

Article I of the Cuban treaty provides reciprocally that all merchandise the product of the soil or industry of the respective parties which at the time of its negotiation was being imported into the other free of duty should continue to be so admitted into each country.

Article II provides that during the term of the treaty all merchandise not included in Article I "and being the product of the soil or industry of the Republic of Cuba imported into the United States shall be admitted at a reduction of 20 per cent of the rates of duty thereon, as provided by the tariff act of the United States approved July 24, 1897, or as may be provided by any tariff law of the United States subsequently enacted."

Article III provides that all merchandise not later enumerated in the treaty and not included in Article I which is the product of the soil or industry of the United States, when imported into Cuba, shall be admitted at a reduction of 20 per cent of the rates of duty thereon as then or thereafter provided in the customs tariffs of Cuba.

Article IV provides for a reduction of the applicable Cuban duty rates of percentages varying from 25 to 40 upon certain merchandise produced in the United States when imported into Cuba.

Article VII provides "that similar articles of both countries shall receive equal treatment on their importation into the ports of the United States and of the Republic of Cuba, respectively."

Article VIII provides that "the rates of duty herein granted by the United States to the Republic of Cuba are and shall continue during the term of this convention preferential in respect to all like imports from other countries, and, in return for said preferential rates of duty granted to the Republic of Cuba by the United States, it is agreed that the concession herein granted on the part of the said Republic of Cuba to the products of the United States shall likewise be, and shall continue, during the term of this convention, preferential in respect to all like imports from other countries." The proviso to Article VIII, which is repealed by said subsection B, is not material to any issue in these cases. (See Malloy's Treaties, Conventions, etc., vol. 1, p. 353.)

It is agreed that the tobacco and cigars here involved are within the provisions of Article II of the treaty and entitled to the reduction of 20 per cent therein provided, so that the only issue is whether the 5 per cent discount provided in J, subsection 7, shall also be allowed thereon.

The Board of General Appraisers sustained the claim of the importers to such discount.

The Government in substance contends that, if this 5 per cent discount is to be allowed to any importations, nevertheless it can not be allowed to those from Cuba for the following reasons: (*a*) That it would impair the provision for equal treatment contained in said Article VII of the treaty and in the act of Congress effectuating it which provides in section 2 thereof "that articles of the Republic of Cuba shall receive, on their importation into the ports of the United States, treatment equal to that which similar articles of the United States shall receive on their importation into the ports of the Republic of Cuba" (33 Stat. L., pt. 1, p. 4); (*b*) that if the 5 per cent discount is allowed it will impair or affect Article II of the Cuban treaty, and (*c*) that the Cuban treaty confers all the rights which are intended to be conferred with respect to imported merchandise.

The importers claim that as the merchandise is expressly within the language of J, subsection 7, it is entitled to the discount therein provided; that as it is also within the express provisions of Article II of the treaty the reduction must be allowed; and that the allowance of the 5 per cent discount is no violation of the treaty.

We think it is quite apparent that the provisions of the Cuban treaty require, as was held in Faber *v.* United States (221 U. S., 649, 660), that imports from Cuba shall be given a preferential of 20 per cent from the tariff rates on imports from countries which are foreign to the United States.

We find nothing in the Cuban treaty which expressly prohibits the discount which is granted to merchandise imported in vessels of our registry when such merchandise happens to come from Cuba; nor do we think it is in anywise impliedly forbidden therein.

Surveying this treaty as a whole, it appears that all merchandise being the product of the soil or industry of the one country which was at the time of its negotiation admitted free of duty into the other shall reciprocally so continue; that, excluding the foregoing, all merchandise the product of the soil or industry of Cuba when imported into the United States shall be admitted at a reduction of 20 per cent from the rates of duty provided therefor by the laws of the United States then or thereafter in force; that all merchandise being the product of the soil or industry of the United States not entitled to free entry into Cuba, the duties upon which are not otherwise specifically provided for in the treaty, shall be admitted into Cuba at 20 per cent reduction from the rates thereon as then or thereafter provided by the tariff laws of Cuba; that a considerable list of articles specified in the treaty the product of the soil or industry of the United States, when imported into Cuba, shall enjoy a reduction—some of 25, some of 30, and some of 40 per cent—on the customs duties imposed by Cuba; that tobacco in any form of the United States or

its insular possessions shall receive no reduction from the Cuban duty rates when imported therein.

It should be noted that this last above conclusion is based upon Article VI of the treaty which provides that "the tobacco, in any form, of the United States or any of its insular possessions shall not enjoy the benefit of any concession or rebate of duty when imported into the Republic of Cuba."

Restated, these provisions contemplate equal reciprocal treatment as to merchandise entitled to free entry; that as to merchandise, not otherwise provided for, a like treatment is contemplated by allowing a 20 per cent reduction from the duty imposed thereon by the general tariff laws of the party into whose ports it may be imported from the other; and that as to certain merchandise, the product of the soil or industry of the United States, imported therefrom into Cuba, a favor of more than 20 per cent reduction on the normal tariff rates of Cuba is allowed, while tobacco imported into Cuba from the United States or its insular possessions is to receive no reduction.

This summary brings out clearly the fact that the duties are not in all respects equal and reciprocal. It shows also the reason why they are declared to be preferential and the necessity, in order to execute the preferential purpose, of allowing the 20 per cent reduction to apply to the duties charged on like merchandise when imported from other countries in vessels of our registry.

As to the Government's contention that the allowance of the discount violates Article VII of the treaty and the act of Congress effectuating the same, we think the answer is that those provisions do not relate to the duties to be assessed on imported merchandise by either party; if so, the provision would seem to be in conflict with Article IV of the treaty, which, as we have already pointed out, provides for a reduction of duties larger than 20 per cent on a great many articles of merchandise imported from the United States into Cuba, but which, if imported from Cuba into the United States, would, under Article II, only receive the 20 per cent reduction. It also conflicts with Article VI, which provides that tobaccos imported from the United States or its insular possessions into Cuba shall receive no reduction. Doubtless the intent of Article VII was to provide that in all matters other than the determination of customs duties equal treatment, freedom, and privileges should be accorded to the merchandise of the respective parties in the ports of the other. But even admitting the Government's interpretation of Article VII, the allowing of the 5 per cent discount on goods imported in vessels of our registry would not be a violation of the article because the proviso to J, subsection 7, as we have held, gives a like allowance to merchandise imported in the registered vessels of other nations whose treaties contain the necessary reciprocal pro-

vision, and Article VII must be given such reciprocal force if it be construed as contended for by the Government.

The Government's second contention may be answered by saying that Article VI of the Cuban treaty expressly negatives the idea that reciprocal treatment shall be accorded to tobaccos imported from one country into the other, while Article II requires the 20 per cent reduction to be allowed on the tobaccos imported from Cuba into the United States, and we have already held that the duty to be assessed on merchandise imported in this way must be ascertained by deducting the 5 per cent discount, and if on the amount so determined the 20 per cent reduction is allowed, the intent of Article II is fully accomplished.

The Government's third contention may be answered by saying that the entire treaty contemplates, and in Article VIII it is expressly declared, that the rates of duty therein provided for are preferential in respect to all like imports from other countries, and as the duty from other countries on merchandise imported in our registered vessels and imported in vessels of the registry of the nations whose treaties contain the reciprocal commercial provision is entitled to the 5 per cent discount, the preferential rate can be given to Cuba only by allowing the 20 per cent reduction to apply to the duty as ascertained in our ports after the 5 per cent discount has been taken therefrom, for it is plain that unless both discounts be allowed upon the merchandise involved in these importations the preferential which is really allowed to Cuba is not more than 15 per cent.

We are of opinion that the proper duty to be collected upon these importations from Cuba is to be determined by first deducting the 5 per cent discount allowed thereon because of its importation in vessels of our registry, and from the sum thus obtained to make a further reduction of 20 per cent in accordance with the stipulations of the Cuban treaty. In this manner, and in this manner only, can effect be given to both our statute and to the Cuban treaty.

In disposing of this issue we have undertaken to apply the rule that treaties are to receive a fair and liberal interpretation in a spirit of utmost good faith, in a manner to carry out their manifest purpose, and that when susceptible of two interpretations, one restrictive as to rights that may be claimed under it and the other liberal, the latter is to be preferred.

Worcester *v.* Georgia, 6 Peters, 515, 582.
Hauenstein *v.* Lynham, 100 U. S., 483.
Tucker *v.* Alexandroff, 183 U. S., 424.
Johnson *v.* Browne, 205 U. S., 309.

We think any lengthy discussion of the constitutional question here is unnecessary. Treaties containing these reciprocal commercial or

other provisions, the effect of which was to regulate commercial intercourse or to modify or control the collection, amount, or rate of tariff duties, have been considered by the Supreme Court on many occasions. Never, so far as we are aware, has that tribunal directly passed upon the question as to whether in the particular case the exercise of the now challenged power was or was not constitutional. It has been careful to say on one occasion that whether Congress was constitutionally bound to make an appropriation to carry out the terms of a treaty was expressly reserved from its decision, but no doubt was expressed as to the power to make the treaty. De Lima *v.* Bidwell, 182 U. S., 1, 198.

In several of the cases, if the treaties under consideration had been deemed unconstitutional, they could have been disposed of upon that ground alone and a discussion of other questions would thereby have become unnecessary. Among this class of cases are Oldfield *v.* Marriott, 10 How., 51 U. S., 146; Olsen *v.* Smith, 195 U. S., 332; Bartram *v.* Robertson, 122 U. S., 116; and Whitney *v.* Robertson, 124 U. S., 190.

In United States *v.* Forty-three Gallons of Whiskey (93 U. S., 188), Same *v.* Same (108 U. S., 491), Fourteen Diamond Rings *v.* United States (183 U. S., 176), Cross *v.* Harrison (16 How. (57 U. S.), 164), United States *v.* Johnson (124 U. S., 236), Head Money Cases (112 U. S., 598), United States *v.* Lee Yen Tai (185 U. S., 213), The *Peggy* (1 Cr., 103), Foster *v.* Neilson (2 Pet., 314), In re Ross (140 U. S., 453), Geofroy *v.* Riggs (133 U. S., 258), Hauenstein *v.* Lynham (100 U. S., 483), Fort Leavenworth, etc., *v.* Lowe (114 U. S., 525), Chew Heong *v.* United States (112 U. S., 536), various aspects of treaties and the scope and extent of the treaty making power as expressed in the Constitution are considered and discussed, but in none is it intimated that the exercise of that power is limited by the Constitution as held by the Board of General Appraisers. The above list does not exhaust but illustrates the cases.

From the earliest history of our Government under the present Constitution it is clear that the treaty-making power has negotiated and ratified treaties containing these reciprocal commercial provisions. In addition to those involved in these cases such provisions may be found in treaties with the following countries: Brazil, 1825; Venezuela, 1836; Greece, 1838; the two Sicilies, 1856; the Ottoman Empire, 1862; Salvador, 1874; and there are others.

The power to make, the beginning, growth, and development of the policy of these reciprocal commercial treaties is clearly set forth in Moore's Digest of International Law, volume 5, page 162, et seq.

It was thought by the board that such treaties were unconstitutional in that they invaded the constitutional prerogative of Congress. It may be observed, and the fact has already been referred

to at some length in another connection, that since at least as early as 1816 there have been statutes in force substantially if not all the time providing for an additional or discriminating duty of 10 per cent ad valorem in addition to the normal duties otherwise imposed by then tariff acts upon all merchandise imported in foreign vessels, with a proviso that such additional duty shall not apply to goods, wares, and merchandise imported in ships or vessels not of the United States, *entitled by treaty* or by any act or acts of Congress to be entered into the ports of the United States on the payment of the same duties as are paid on goods, wares, and merchandise imported in ships or vessels of the United States, and this provision is also found in J, subsection 1, of the act of 1913. In the tariff act of 1897 (30 Stat., 209) the proviso is limited to merchandise imported in foreign vessels entitled by *treaty or convention* to be entered in our ports, etc.; in other words, leaving out the otherwise uniform provision for an exemption by virtue of our statutes as well as treaties.

It was said by Justice McKenna, then Attorney General, in 1897, in an opinion furnished by him to the Treasury Department (T. D. 18431) that "a law imposing discriminating duties has been on the statute books in some form from the enactment of the first tariff bill." The question considered in that opinion involved an examination of one of the statutes containing the above additional or discriminating duty provision, and the exempting proviso. (See also the opinion of the Board of General Appraisers by Somerville, general appraiser, T. D. 18915.)

It is hardly necessary to state that these provisos exempting merchandise in vessels of treaty nations from such discriminating duties relate expressly to the class of treaties under consideration, because they alone contain the provisions that justify and give force to the language of the proviso.

We are aware of no action on the part of Congress indicating any claim on its part that such treaties were an invasion of its power, although we are not unaware that the Senate and House of Representatives have been at variance upon this question.

The Treasury Department, in the enforcement of tariff laws, has from the date of its earliest printed volume of regulations, 1857, and we have no doubt from the date of the first tariff act, recognized and enforced these reciprocal commercial provisions as the law of the land, knowledge and not ignorance of which fact must be imputed to Congress. (See the following Customs Regulations, 1857, arts. 303, 940, and 972; 1874, art. 495; 1884, arts. 252, 269, 573, and 574; 1892, art. 904; 1899, art. 1434; 1908, art. 1055. See also T. D. 18915, and also the opinion of Justice McKenna in T. D. 18431.)

It is said in Story on the Constitution, fifth edition, section 150 that—

The power "to make treaties" is by the Constitution general; and of cour it embraces all sorts of treaties, for peace or war, for commerce or territor for alliance or succors, for indemnity for injuries or payment of debts, for t recognition and enforcement of principles of public law, and for any other pu poses which the policy or interests of independent sovereigns may dictate their intercourse with each other. But though the power is thus general a unrestricted, it is not to be so construed as to destroy the fundamental laws the State. A power given by the Constitution can not be construed to authori a destruction of other powers given in the same instrument. * * * A trea to change the organization of the Government, or annihilate its sovereignty, overturn its republican form, or to deprive it of its constitutional powers, wou be void; because it would destroy, what is was designed merely to fulfill, the w of the people.

And in section 1509:

The power of making treaties is indispensable to the due exercise of nation sovereignty, and very important, especially as it relates to war, peace, and co merce.

(See also Watson on the Constitution, vol. 2, p. 955, and Butler Treaty Making Power of the United States, vol. 2, sec. 430.)

From this somewhat incomplete survey of the entire situation w conclude that the challenged authority of the treaty-making pow has always been exercised by it; that the constitutionality thereof h never been denied by the Supreme Court, although *opportunity* so do has presented itself; that Congress has always recognized a acquiesced therein; that the executive departments of the Gover ment have all assumed and proceeded upon the theory that su power had been constitutionally exercised.

We are of opinion that, considering the constitutional challen alone, these treaties are clearly within the right of the treaty-maki power to negotiate and ratify, and that when duly proclaimed accordance with their terms they are until denounced or until th expire by their own limitation, or are by express or necessary imp cation repealed by act of Congress, operative and in force as the l of the land.

If there were doubts as an original question upon this claim, think the case of United States *v.* Midwest Oil Co. et al., heard the Supreme Court at its October term, 1914, and decided Februa 23, 1915, is of pertinent application, and we quote one paragraph that opinion.

But government is a practical affair, intended for practical men. Bo officers, lawmakers, and citizens naturally adjust themselves to any lo continued action of the executive department—on the presumption that un thorized acts would not have been allowed to be so often repeated as to crys lize into a regular practice. That presumption is not reasoning in a circle,

the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

There remains, however, for discussion the question as to whether or not these treaties are self-executing. By the Board of General Appraisers they were held not to be such, and it is thought by some that the board should be sustained upon this issue. Whether or not a treaty is self-executing depends upon whether it is operative *ex proprio vigore*, or whether it requires some legislation to make it effective. This rule has long been established.

Foster *v.* Neilson, 2 Peters., 253, 314.
The Chinese Exclusion case, 130 U. S., 600.
Bartram *v.* Robertson, 122 U. S., 116.
Whitney *v.* Robertson, 124 U. S., 190.
Shaw *v.* United States, 1 Ct. Cust. Appls., 426.
American Express Co. *v.* United States, 4 Ct. Cust. Appls., 146.

At the outset it may be doubted whether, in view of the Government's concession and claim, we are justified in an extended discussion of this question. The Government says, quoting from its brief:

It is no longer material whether the treaties were originally executory or self-executing. Congress long since enacted legislation which executed all of the treaties which were merely executory, and by the proviso to subsection 7 Congress expressly stated its intent to respect all the treaties.

And, again, referring to the case of Terlinden *v.* Ames (184 U. S., 270), where a Prussian treaty regulating extradition and claimed to be of no force because subsequent to its ratification Prussia had been merged in the German Empire was held by the Supreme Court to be in force pursuant to the recognition thereof by the executive department, the Government here says:

By a parity of reasoning, therefore, we may say of the treaties now under discussion that if the departments of our Government which are intrusted with the foreign intercourse of the Nation have recognized the existence and validity of these treaties, and if Congress has acted and has forbidden any construction of subsection 7 which would abrogate, impair, or affect them, it would be an anomaly to have an opposite construction maintained in the courts. It would be monstrous for a court to assert that the treaties were so inoperative that no attention need be paid to their requirements. Yet this is just what the Board of General Appraisers has done. They have placed themselves at odds both with Congress and with the treaty-making branch of the Government. They have construed the act as if it had no proviso. This is utterly inadmissible.

It would seem when one party to contracts which have been in existence for periods varying from a century to not less than 12 years, and which by both parties have during all the same time been recognized as of valid and binding force, asks that such contracts continue to be so regarded by the courts that occasion should not

be taken to declare the same invalid and of no force unless a different conclusion is legally impossible. There is force in the Government's statement that it would be monstrous for a court now to deny their legality.

The case of Charlton *v.* Kelly (229 U. S., 447) is somewhat in point. There Charlton sought to avoid extradition to Italy. He claimed that the United States was not bound to deliver him to the Italian authorities to be tried for a crime charged to have been committed in Italy, in substance, because, under the extradition treaty with that Kingdom which reciprocally provided for the delivery by either treaty party to the other, of persons convicted or charged with certain crimes committed within the jurisdiction of one of the contracting parties, Italy had refused to deliver up Italian subjects charged with the commission of the prescribed crimes in the United States upon the request of this country. Following a careful discussion of the subject of extradition treaties, the court said, at page 469:

> We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality the treaty has thereby ceased to be of obligation on the United States.

Then followed statements to the effect that although Italy's attitude was a violation of the treaty obligation and would have justified the United States in denouncing the treaty, that it was nevertheless valid here until its abrogation was declared by the United States. The court found that the political branch of our Government recognized the treaty obligations as in force, and held that such interpretation of the treaty was binding upon the courts, saying in the closing paragraph of the opinion that—

> The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

So it might be said here that, inasmuch as the political branch of our Government has recognized and does recognize these treaties as self executing or executed and the reciprocal commercial provisions as in force, not only this but protests against any other interpretation thereof, that the court should accede to that view. Especially is this so when the other litigating parties whose rights are in question here make the same claim. In this connection, see In re Thomas (12 Blatch., 370), Terlinden *v.* Ames, supra.

We proceed to consider the case of Taylor *v.* Morton (23 Fed. Cases, 784), which is often regarded as a leading authority on the question of self-executing treaties, cited by the board.

The question *decided* there was that a Federal statute, enacted *subsequently* to a treaty, abrogated or repealed so much of the treaty

as was inconsistent therewith. There is no doubt as to the correctness of this holding. The treaty provision reviewed in that case was not like those under consideration here. It was Article VI of the Russian treaty of 1832, providing that—

> No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article, the produce or manufacture of the United States, than are or shall be payable on the like article, being the produce or manufacture of any other foreign country.

The statute of 1842 imposed a duty of $40 per ton on hemp, excepting Manila, Suera, and other hemps of India, on which a duty of $25 only was to be levied. The sole issue was that of law as to whether, in view of the language of the tariff act, the statute or the treaty regulated the duty rate, and the greater part of the court's opinion was devoted to that question. The act contained no provision saving or excepting the rights under the treaty provision in question and it was justly decided that the law superseded the treaty and that the rates provided in the statute controlled the importation. In passing it should be noted that no such question is presented here, because the reciprocal commercial provisions provide in fact that whatever tariff rates are established by the statute such rates apply to the merchandise imported by the treaty nations in their own vessels. In other words, the treaties here, disregarding for the moment J, subsection 7, provide for the assessment of the *same* duties as are fixed under the general law. But after having *decided* the case the learned judge took occasion to indulge in further discussion in which he said "the truth is that this clause in the treaty is merely a contract addressing itself to the legislative power." As the matter then stood this statement was exact. The legislative department had not refrained from imposing higher duties upon Russian hemp than upon certain hemps of India; in that status the treaty could have and did have no other vital force left than that of a contract addressing itself to the legislative body, and any claim accruing by reason of the invasion of the treaty provisions by the statute addressed itself to the executive and not to the judiciary. Of the soundness of this conclusion there is no question.

While it is often claimed that this case was affirmed in the Supreme Court with respect to *all* that was said therein, it should be here noted that although the *judgment* was affirmed (see Taylor *v.* Morton, 67 U. S., 481), it was wholly upon a question of practice and not on the merits. Whatever may have been the proper interpretation of the provisions of the Russian treaty, if not repealed by any statute, we think the Supreme Court has indicated that treaty stipulations like those before us are self-executing.

In Bartram *v.* Robertson (122 U. S., 116), the court considered the effect of the following provisions of the Danish treaty of 1826:

ARTICLE I. The contracting parties, desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage, mutually, not to grant any particular favor to other nations in respect of commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely if the concession were freely made, or upon allowing the same compensation if the concession were conditional.

ART. IV. No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed upon the importation into the said dominions of any article the produce or manufacture of the United States than are or shall be payable on the like articles, being the produce or manufacture of any other foreign country.

A treaty had been concluded in 1875 between this country and the Hawaiian Islands which the court found to have been executed for valuable reciprocal concessions which were absent in the case of the Danish treaty. Under the Hawaiian treaty certain merchandise was entitled to free entry when imported from that kingdom, and the same favor was claimed for like Danish merchandise under the quoted provisions of that treaty, although the general tariff laws fixed a duty upon such merchandise and contained no exception referrable to the Danish treaty. The Hawaiian treaty had been ratified by an act of Congress. The court held that such provisions as were in the quoted parts of the Danish treaty—

even if conceded to be self-executing by the way of a proviso or exception to the general law imposing the duties, do not cover concessions like those made to the Hawaiian Islands for a valuable consideration. They were pledges of the two contracting parties—the United States and the King of Denmark—to each other that in the imposition of duties on goods imported into one of the countries which were the produce or manufacture of the other there should be no discrimination against them in favor of goods of like character imported from any other country. They imposed an obligation upon both countries to avoid hostile legislation in that respect. But they were not intended to interfere with special arrangements with other countries founded upon a concession of special privileges. The stipulations were mutual, for reciprocal advantages. "No higher or other duties" were to be imposed by either upon the goods specified; but if any particular favor should be granted by either to other countries in respect to commerce or navigation, the concession was to become common to the other party upon like consideration; that is, it was to be enjoyed freely if the concession were freely made, or on allowing the same compensation if the concession were conditional.

The treaty with the Hawaiian Islands makes no provision for the imposition of any duties on goods the produce or manufacture of that country imported into the United States. It stipulates for the exemption from duty of certain goods thus imported in consideration of and as an equivalent for certain reciprocal concessions on the part of the Hawaiian Islands to the United States. There is in such exemption no violation of the stipulations in the treaty with Denmark; and if the exemption is deemed a "particular favor" in respect of commerce and navigation, within the first article of that treaty, it can only be claimed by Denmark upon like compensation to the United States. * * * When such compensation is made it will be time to consider whether sugar from her dominions shall be admitted free from duty.

In the case of Whitney *v.* Robertson (124 U. S., 190) practically the same question was considered and the same conclusion reached. There it was again announced that a subsequent statute repealed a prior inconsistent treaty.

It is entirely clear that in these cases the Supreme Court held that the general favored nation clause in a treaty did not operate to bring within its scope special concessions granted to other nations for a compensation or consideration and it refrained from deciding whether, if compensation were tendered for the same favors by the other party, the favored nation clause would entitle it to the like privilege; and it also expressly refrained from saying, although it had the question in mind, whether or not the treaties in those cases were or were not self-executing.

In the case of Oldfield *v.* Marriott (10 Howard, 51 U. S., 146), the Supreme Court considered a case involving some of the same treaty provisions that are now before us. The act of July 30, 1846, exempted from duty tea and coffee when imported directly from the place of their growth or production in American vessels or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges.

The Portugese treaty made in 1840 (8 Stat., 560, art. 2) provided that vessels of either country arriving in the ports of the other should be treated there upon the same footing as national vessels coming from the same place with respect to the duties or tonnage, etc., levied upon vessels of commerce.

It was claimed by importers under these provisions of the statute and treaty that tea and coffee imported in Portugese vessels but not of Portugese production were entitled to exemption from a discriminating duty of 10 per cent ad valorem imposed by the act of August 30, 1842, section 11, which is a statute containing one of the 10 per cent additional or discriminatory duty provisions hereinbefore referred to.

The court pointed out that the reciprocal treaty stipulations invoked related to an entire reciprocity of duty and charges upon *vessels* of the two respective nations and did not relate to merchandise imported therein.

It then proceeded to discuss articles 3, 4, 5, 6, and 13 of the treaty, of which it said in substance that articles 13 and 3 provided that neither nation should grant to any other a particular favor in navigation or commerce that should not become common to the other party upon the same terms, and that the productions of either nation were entitled to admission into the ports of the other upon payment of the same duty as would be payable thereon if they were the growth of any other foreign country; that by virtue of these two provisions no prohibition could be put upon the importation or exportation of articles from either country other than was charged

upon like articles exported to any other foreign country; that under articles 4, 5, and 6 both nations could carry in their vessels the productions of each into the other upon the same terms, and in concluding its discussion of these and other articles it said:

> From all this it must be seen that neither nation has a right by the treaty to carry in its vessels to the ports of the other the produce of foreign countries except upon the payment of such duties, discriminating and otherwise, as each nation may impose.

The court also alluded to the fact that both nations had evidently so understood and had so applied these treaty stipulations. It denied the claim of importers, and in the course of further discussion, as supporting its conclusion, adverted to the fact that when the act of July 30, 1846, was passed there were outstanding commercial treaties with 24 nations, among which it named Austria, Prussia, Sweden, Hanover, and the Hanseatic cities. It will be observed that the treaties involved in the cases now before us were made before July 30, 1846, and we conclude they are the identical treaties referred to by the court, and of which, with others, it then proceeded to say, they—

> had acceded to the most liberal and extended basis of maritime and commercial reciprocity. They admit our vessels to enter their ports, whether coming from the United States or any other foreign country, laden or in ballast—whether laden with the produce of the United States or of any other foreign country—paying the same tonnage duties and charges as national vessels. * * * They admit the produce of the United States to entry, either for consumption or for reexportation, on payment of the same duties and charges as similar articles the produce of any other foreign country pay when imported in American or national vessels; and the production of other foreign countries likewise, on payment of the same duties and charges, whether imported in American or national vessels and whether coming from the United States, the country of production, or any other foreign country.

The opinion, after referring to other matters not important here, proceeds thus:

> Having shown that there are nations which have a right by treaties to bring into our ports in their vessels the produce of foreign nations from the places of their production upon the same terms that our own vessels may import them, the act exempting coffee from duty when brought in American vessels direct from the place of its growth, or when brought by foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, has a plain intention and certain application. Its terms are no longer doubtful. No room is left for interpretation. The nations to which it applies are known.

In this opinion it is true that the court did not allude to the question of whether any of the treaties were or were not self-executing, but it is entirely clear that they were assumed to be so, and, considering the length and exhaustiveness of the opinion, we can not for a moment believe that the court overlooked this question. It must be regarded not only as an approval of the authority of the treaty-

making power to negotiate the treaties here under consideration but also as an authority that such treaties and the stipulations thereof before us are self-executing.

In Olsen *v.* Smith (195 U. S., 332) among other questions the court considered whether a Texas statute regulating pilotage was an invasion of the provisions of our present treaty with Great Britain, already herein referred to, that—

> No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels than those payable in the same ports by vessels of the United States; nor in the ports of any of his Britanic Majesty's territories in Europe on the vessels of the United States than shall be payable in the same ports on British vessels.

It was held that the statute was not in conflict with that provision of the treaty. It will be noticed that the quoted stipulation provides for the reciprocal treatment of vessels only. But its language, except that it relates to the charges upon vessels instead of the merchandise imported therein, is practically identical with the reciprocal commercial provision of the British treaty involved in these cases.

It is again true that the court did not discuss the question as to whether or not the treaty provision was self-executing; it did, however, by holding that the State statute was not in conflict with the treaty, recognize that the treaty was in force as law. Had the court considered this provision as not operative, because executory only, there was no occasion to hold that the statute did not conflict therewith. A conflict of this kind occurs only when two or more provisions *in force* are found to exist. Manifestly the court thought the treaty valid and self-executing. If so in that case it would seem to be so here.

It must be remembered in considering the self-executing question that there is no issue as to the authority of the treaty-making power to negotiate these treaties, because whether or not treaties are self-executing is simply a question as to whether or not they require further legislation to give effect thereto. Their validity and binding force in all other respects is assumed. The difficulty lies in determining whether the legislation is necessary. It is of some significance here that until now it does not seem to have been thought necessary to so execute these treaties, and no litigant or treaty party now so thinks.

In Davis *v.* Burke (179 U. S., 399), the Supreme Court considered whether or not a clause of the constitution of Idaho was self-executing, and as indicative of the exact meaning of the term "self-executing," we quote from what was said on the subject in that case:

> Where a constitutional provision is complete in itself it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject or for the incorporation of cities of certain population or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution.

And in this connection the court cites, with approval, from Cooley's Constitutional Limitations, as follows:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected or the duty imposed may be enforced.

We see no reason why this last statement of the rule is not applicable and may not properly be applied to the treaties here. They supply a sufficient rule for the assessment of the duty upon the merchandise imported in the vessels of the foreign treaty nations because they stipulate that it shall be the same as that imposed upon like merchandise imported in our vessels, and as to the rates and amounts of such duties the statute makes explicit provision.

We do not understand it is claimed that to be self-executing, treaties of this nature must prescribe a code for their enforcement, but that it is sufficient if provisions therefor are found in the statutes. Such seems to be the settled law. (United States *v.* Forty-three Gallons of Whisky, 93 U. S., 188. Same *v.* Same, 108 U. S., 491. Fourteen Diamond Rings *v.* United States, 183 U. S., 176, 184. Cross *v.* Harrison, 16 How. (57 U. S.), 164. De Lima *v.* Bidwell, 182 U. S., 1, 192.)

It is proper to consider what enactment of Congress was or is necessary to give force to the provisions of these treaties. There is no uncertainty as to the merchandise to which they relate, neither is there uncertainty as to the duties to be levied and assessed thereon. The most that Congress could do would be to enact an affirmative statute specifically providing for the assessment of the same rates on merchandise when imported in vessels of the foreign treaty nations as those imposed upon like merchandise imported in our vessels. If this were necessary, it would seem that with each succeeding tariff enactment it would be equally necessary for Congress to again enact a like confirmatory statute, if in the subsequent act such rates were changed, because we must not forget that the question now is not whether the provision is *valid* but whether it supplies a sufficient rule by means of which the right given may be enjoyed or protected or the duty imposed enforced. It seems sound and correct to say that each treaty here establishes the right to the same duties as are imposed on merchandise imported in our vessels and for the precise rate thereof refers to the statute which fixes the same. So applied there is no necessity of confirmatory legislation. The treaty immediately adapts itself to each change in our tariff statutes, varying the rates of duty as they are varied thereby, and is never in conflict therewith. It answers the natural meaning of "self-executing"; it operates of its own force upon the changing conditions produced by changes in our tariff laws.

The question involved upon this phase of the case is similar to that before this court in American Express Company *v.* United States (4 Ct. Cust. Appls., 146 at 159), where, by Montgomery, presiding judge, the principles applicable to the determination of whether or not a treaty is self-executing were carefully considered. Although the treaty provisions in question here are different (in that case it was the favored-nation clause), nevertheless what was said there is illuminative of the issues here and is referred to with approval.

In an opinion rendered by the Attorney General to the Secretary of State, January 12, 1915, touching the authority of the Secretary of the Treasury to permit the importation of foreign cattle into this country, the favored-nation clause of the treaty between New Granada, now Colombia, and this country was considered in connection with a subsequent statute allowing particular favors to such importations from Mexico, the question being whether, by virtue of the favored-nation clause, Colombia was entitled to the same privileges accorded to Mexico by the statute. It was concluded that the favored-nation clause *ex proprio vigore* operated to give to Colombia the particular privileges which Mexico enjoyed under the statute, a conclusion precisely in line with that reached in the case of American Express Company *v.* United States, supra.

Referring now to both the constitutional and self-executing questions, it may be said of these treaties that the most of them are hoary with age, and the particular provisions of all of them under consideration here are familiar acquaintances in fact or in principle of the executive, legislative, and judicial officers of the Government, past and present. By no department of government have these provisions ever been repudiated or denounced as unconstitutional or denied force and effect as executory merely, so far as we can ascertain. On the contrary, they have during all the time since their negotiation been recognized, respected, and enforced. To now hold them invalid for any reason, in view of these circumstances, would in any event be to assume a grave responsibility, and to defeat them in the face of the contention of the Department of State, the Treasury Department, and the Department of Justice would be little less than usurpation. Fortunately, the duty of repudiating them can by no stretch of authority rest with us, for the very statute which we are now construing in terms recognizes their existence and binding force and declares in effect that they shall not thereby be abrogated or in any manner affected or impaired. It is a matter of some gratification to know that the executive departments of our Government uncompromisingly insist that our treaties shall be observed by us.

We think these treaties are self-executing and that they have been so recognized in each and every of the tariff statutes passed since their ratification and promulgation by virtue of the proviso to each of the statutes imposing the 10 per cent additional or discriminating duty. We also think, for the purpose of determining the issues here, they were likewise so recognized by the proviso to J, subsection 7. If this conclusion be unsound it is also clear to us that the effect of the proviso is to say, if any outstanding treaties, whether the same be self-executing or not, make provision for the assessment of duty upon merchandise imported in the vessels of the treaty nations, which provision would be invaded by the allowance of a 5 per cent discount upon like merchandise imported in our vessels, that there shall be allowed the same discount to the merchandise imported in vessels of the treaty nations. In other words, without reference to the question of whether these treaties are or are not self-executing, the provisions therein for the assessment of duty upon merchandise imported in vessels of the treaty nations is made by statute to control. That is, the statute makes the treaty a part of itself.

Restating the conclusions already reached, we are of opinion:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the 5 per cent discount as held by the board, whose judgment relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the 5 per cent discount must be allowed, and with respect to such merchandise the judgment of the Board of General Appraisers is reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the 5 per cent discount thereon, and the judgment of the board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of 20 per cent ad valorem provided by the Cuban treaty and the further discount of 5 per cent ad valorem from the amount so ascertained. As to such importations, the judgment of the Board of General Appraisers is affirmed.

DISSENTING OPINION BY DE VRIES, J.

The issues are aptly stated in the majority opinion. I am regretfully not in accord therewith and respectfully submit the following considerations: The tariff act of 1913, among other matters, enacted in the order below recited certain provisions, which, together with treaty Article I of the treaty of 1852 with Netherlands (10 Stat., 982), also quoted, fairly present the laws to be construed:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after the day following the passage of this act, except as otherwise specially provided for in this act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed, namely:

* * * * * * *

Paragraphs 1 to 386 levy duties at prescribed rates upon certain described imported merchandise.

* * * * * * *

SECTION IV. A. That for the purpose of readjusting the present duties on importations into the United States and at the same time to encourage the export trade of this country, the President of the United States is authorized and empowered to negotiate trade agreements with foreign nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce: *Provided, however*, That said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection.

B. That nothing in this act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed.

* * * * * * *

J. Subsection 1. That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which, being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or act of Congress to be entered in the ports of the United States on payment of

the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.

* * * * * * *

J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Netherlands treaty of 1852 (10 Stat., 982): Art. I. Goods and merchandise, whatever their origin may be, imported into or exported from the ports of the United States, from and to any other country, in vessels of the Netherlands, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels. Reciprocally, goods and merchandise, whatever their origin may be, imported into or exported from the ports of the Netherlands, from and to any other country in vessels of the United States shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels.

The bounties, drawbacks, and other privileges of this nature which may be granted in the States of either of the contracting parties on goods imported or exported in national vessels shall also and in like manner be granted on goods imported or exported in vessels of the other country.

The appeals present for decision the question (1) whether J, Subsection 7, upon enactment of the tariff act of 1913, became operative *in præsenti* or *in futuro;* and (2) if the former, are the treaty articles either self-executing or executed by subsection 7, thereby extending the 5 per cent discount to all such treaty nations?

The conclusion is of unusual importance both as to the magnitude of the interests, affecting the immediate parties, and the international rights involved. The issues should, therefore, be resolved as illuminated by all applicable sources of enlightment.

The object here sought to be accomplished by Congress, as distinguished from the intent manifested by the enactment employed to that end, is written in the judicial and legislative history of the subject matter—the American merchant marine.

The long-established practice of the courts in the determination of the relative effects of statutes and treaties, and the congressional intent in such statutes, is to trace the history and policy of the Government upon the subject matter as witnessed by the treaties concluded, statutes made, and the administrative and executive policies adopted. Oldfield *v.* Marriott (10 How., 51 U. S., 146); Downs *v.* United States (187 U. S., 496); Aldridge *v.* Williams (3 How., 44 U. S., 8, 23); United States *v.* Trans-Missouri Freight Association (166 U. S., 290, 318); Tilge *v.* United States (2 Ct. Cust. Appls., 129, 131); United States *v.* American Express Co. (2 Ct. Cust. Appls., 634, 635); United States *v.* Whitridge (197 U. S., 135); United States *v.* Union Pacific Railroad Co. (91 U. S., 72, 79).

The condition sought to be remedied was the conspicuous insignificance of the American merchant marine when compared with that of the other greater nations. Historically ours had been in the earlier days of the nation, and even in the colonial days, proportionally many times greater.

In so far as this decadence may have been effected by legislation, it was before the Congress at this enactment that from the period of 1789 to 1815 laws effecting almost complete discrimination were of our statutes; from 1815 to 1828, partial discrimination with partial treaty reciprocally obtained; and from 1828 to 1909, practically complete treaty reciprocity. Be it noted that the policy of discrimination was maintained by positive statute and the gradual transition to the policy of reciprocity was by all the mediative acts, that of March 3, 1815 (3 U. S. Stat., 224), of January 7, 1824 (4 U. S. Stat., 2), and of May 24, 1828 (4 U. S. Stat., 308), legislatively rested conditionally upon the finding of conditions and proclamation thereof by the President. All these acts were in fact and in practice conditional and became effective only upon diplomacy first effecting by treaty the proclaimed condition precedent. In other words, sometimes with and sometimes without the statute naming the condition, the transition from the period of discrimination to that of reciprocity was, in fact and practice, made conditional upon diplomatic agreement. Concurrently with this change and continuance of policy occurred the commencement and continuance of the decadence of the American merchant marine.

This decline Congress knew gradually continued to date, and so continues. The debates disclose that the first act passed by the American Congress July 4, 1789, section 5, allowed a discount of 10 per cent of all duties imported in American-built vessels. In 1795, 92 per cent of our imports and 88 per cent of our exports were so carried; in 1826, 95 per cent of our imports and 89.6 per cent of our exports; in 1830, 93.6 per cent of our imports and 86.3 per cent of our exports; in 1845, 87.3 per cent of our imports and 75.3 per cent of our exports; in 1860, 63 per cent of our imports and 69.7 per cent of our exports; in 1870 American ships carried 35.6 per cent of our foreign trade, which has gradually declined to 9.4 per cent in 1912 and 8.7 per cent in 1913.

In this political and legislative status paragraph J, subsection 7, was passed by the House of Representatives without the proviso, subsequently added in conference, as follows:

J. Subsection 7. That a discount of 5 per cent on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States; * * *

If these words permitted any doubt as to their purpose, the report of the Ways and Means Committee thereupon submitted to the House tolerated no such uncertainty. It read:

> Subsection VII of paragraph J is new legislation providing that a discount of 5 per cent of all duties imposed at the customhouse shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States. It is *a discrimination in favor of American shipping*, similar to the provisions of some of the first tariff bills that were enacted by the Congress of the United States. Under like legislation the merchant marine of the United States was encouraged and developed in the early decades of the last century until our merchant marine became the largest carrier of merchandise in the world. We believe that *to again discriminate* in favor of American shipping will build up *our merchant fleet* and keep at home millions of dollars that are now being paid to foreign vessels to carry the products of our country to foreign markets. (Report, to accompany H. R. 3321, of Committee on Ways and Means, 63d Cong., first session, Rept. No. 5, p. LII.)

It would seem to be important and subsequently instructive to inquire what would have been the precise effect upon existing pertinent treaties had this bill become a law. Upon this point Mr. James R. Mann, minority House leader (Cong. Rec., 63d Cong., 1st sess., vol. 50, pt. 1, p. 744), categorically catechised Mr. Oscar Underwood, chairman of the reporting committee, and House majority leader, to answer:

> There is nothing in the bill there with reference to the treaties * * *. Does the discount apply only to goods brought in American bottoms?

And, after many days for consideration (Cong. Rec., 63d Cong., 1st sess., vol. 50, pt. 2, p. 1358), Mr. Underwood replied:

> Now, there are gentlemen who contend that if subsection 7 were enacted law it would mean, instead of discriminating in favor of American shipping, that we will reduce the duties on all imported goods coming into this country by foreign vessels by reason of treaty rights. I never have believed in that contention. I do not think it is a fair construction of the law; but I have in my office here letters transmitted to me by the State Department from three of the leading maritime nations of the world protesting against this section because they say it is a discrimination against their vessels. Now, if the contention that is being made by gentlemen on that side of the House is correct, that goods coming from Germany, or France, or England, would be admitted 5 per cent cheaper than they would if this section was removed, I can not see why the ambassadors from three great maritime nations should protest against this paragraph. It may be that the chancellors, supposed to be learned in the law of nations, supposed to be here to guard their own countries, are mistaken as to the effect of this paragraph, and that the gentlemen on that side of the House are better lawyers as to the effect on their commerce and their ships than are the chancellors, but I am inclined to think that with the weight of their protests leaning in favor of the construction that I placed on this paragraph in the opening of this debate, it is safe to say that in the end this construction will be maintained.

Was Mr. Underwood in error? If these relevant treaty-articles are executory he was right. If the pertinent treaty articles are self-executing and were not repealed thereby, he was wrong.

If these articles are executory, the proposed enactment *contravened* the treaty *promise* of this country; if they are self-executing and would not have been repealed or would have been executed by the proposed enactment, the treaty conventions would have been neither abrogated nor impaired thereby, but would have become, perforce the treaty in the first and the statute in the latter case, a part of the *municipal* law of the land cognizable as such by the courts. In that view, unless they were executory only, there was no reason for complaint by the combined learning of the chancellors of the leading nations of the world, as the proposed statute, in this view, would in no wise have contravened the treaties.

The legal status seems to have been, however, that if the treaty articles were self-executing they would not survive such an enactment, but being a municipal law would have been repealed thereby, and thus the treaty articles would have been contravened. In no event would the proposed law inure to the benefit of the treaty nations save in the view that it would have executed executory treaty articles, which obviously was not the view of Mr. Underwood or anyone concerned. J. Ribas y Hijo *v.* United States (194 U. S., 315); Chae Chan Ping *v.* United States (130 U. S., 581); Whitney *v.* Robertson (124 U. S., 190).

Since the controversy here concerns the effect of the proviso added by the Senate, it will be instructive to first inquire the scope and effect in the disputed particulars of the House language.

What would have been the status and rights of the treaty nations had the House provision without the proviso become the law? That question must be answered by a reference solely to the treaty articles. Are they self-executing or are these treaty articles executory—promissory?

The board held these treaty articles executory and not self-executing. The majority opinion of this court holds the contrary. I am not clear whether the majority opinion relies upon the status that the treaty articles are self-executing or have been executed by J, subsection 7. In either view I am of the opinion that the board did not err in this particular.

Mr. Justice Day, in his monograph upon treaties (38 Cyc., 961–982, at p. 972), has concisely stated the distinctions between self-executing and executory treaties. Under the title "Treaties"—"Self-Executing Provisions," it is stated: "A treaty is to be regarded in courts of justice as equivalent to an act of Congress whenever it operates of itself *without the aid of any legislative provision.*"

An executory treaty is defined by him as: "When the terms of the stipulation *import a contract*, or when either of the parties *engages to perform* a particular act, the treaty addresses itself to the political and not the judicial department of the Government."

The difference *resides in the character of the treaty article itself* and not in the affecting legislation, age, or construction of the convention. Before a treaty becomes or is self-executing it must contain *as a part thereof* a complete codification or admeasurement of the penalty, reparation, or right due the subjects of the other high contracting power upon contravention of the particular article, so that the courts can *look alone to the treaty* and adjudge in terms measured solely thereby the right guaranteed or reparation due.

The Supreme Court has tersely remarked the distinction between those self-executing treaties which are municipal laws of the land *enforcible by the courts* and those not, in these words: "A treaty, then, is a law of the land *as an act of Congress is whenever* its provisions *prescribe a rule* by which *the rights of the private citizen or subject* may be determined. And when such rights are of a nature to be enforced in a court of justice, that court *resorts to the treaty* for the rule of decision for the case before it *as it would a statute.*" Head Money Cases (112 U. S., 580, 598, 599); Foster *v.* Neilson (2 Peters, 27 U. S., 253, 314); Taylor *v.* Morton (23 Fed. Cas., Case No. 13799, p. 784); Bartram *v.* Robertson (122 U. S., 116); Whitney *v.* Robertson (124 U. S., 190); United States *v.* Forty-three Gallons of Whisky (93 U. S., 188, 196).

While the majority opinion relies upon these cases for the contrary construction of these treaty articles, rather than extend a necessarily lengthy opinion for support of the position here taken, reference is had to a full review upon this point of the above cases and others in the dissenting opinion, American Express Co. *v.* United States (4 Ct. Cust. Appls., 164 to 174, inclusive; T. D. 33434).

A self-executing treaty article derives its character as such from the nature of the article *per se*. Such a treaty duly made needs no law to execute it, but is a codification *per se* of the subject matter prescribing the agreed rights and reparation.

Executory treaties, upon the other hand, being promissory only and usually being applicable to a variety and possibly different classes of acts and degrees thereof, which may violate or contravene them, can not possibly *per se* anticipate or admeasure in advance the appropriate or particular reparation which may become due upon every one of a variety of acts of contravention. And, therefore, that adjustment or its denial must necessarily be one of political wisdom *not measured by any law of the land*, and such treaties, therefore, are not addressed for enforcement to the courts, which enforce its *municipal laws* only, but to the political departments of the Government.

Many of the cases urged upon the court and adopted by the majority as precedents of self-executed treaty articles, are, in my view, not applicable. They are of a large class of cases relating to treaty articles which stipulate *personal rights of citizens and subjects* and are addressed to, stipulated of, and enforcible in our courts, the language of the treaty being a full and complete definition of the particular asserted and adjudged right, no resort being necessary to any statute or other law than the treaty language for the ascertainment of that right. These treaty articles are of a character that brings them exactly within the definition of self-executing treaty articles as rules of action. Perhaps the most concise definition and differentiation of these is found in Head Money Cases (112 U. S., 580, 598), as follows:

> A treaty is primarily a *compact between independent nations.* It depends for the enforcement of its provisions on the interest and the honor of the Governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. *It is obvious that with all this the judicial courts have nothing to do and can give no redress.* But *a treaty may also* contain provisions which confer certain rights *upon the citizens or subjects* of one of the nations residing in the territorial limits of the other, *which partake of the nature of municipal law,* and which are *capable of enforcement as between private parties in the courts* of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that "this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." *A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.* And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a *rule of decision* for the case before it, as it would to a statute.

A very early exposition of this class of cases is had in Ware *v.* Hylton (3 Dallas, 3 U. S., 199, 242, et seq.) Article IV of the Treaty with Great Britain, 1783, was in these words:

> It is agreed that creditors on either side shall meet with no *lawful impediment* to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.

Chief Justice Chase said:

> A *lawful impediment* to prevent a recovery of a debt can only be *matter of law,* pleaded in bar to the action. If the word lawful had been omitted, the impediment would not be confined to matter of law. * * * I consider the fourth article in this light, that it *is not a stipulation that certain acts shall be done,* and that it was necessary for the legislatures of individual States to do those acts; but that it is an express agreement that certain things shall not be permitted the American courts of justice, and that it is a contract on behalf of

those courts, *that they will not allow such acts to be pleaded in bar*, to prevent a recovery of certain British debts. * * * No one can doubt *that a treaty may stipulate that certain acts shall be done by the legislature, that other acts shall be done by the executive, and others by the judiciary.*

In other words, this treaty article stipulated a *rule of action* for the courts, and was in itself the complete legal expression upon the subject, declaring as a rule of law for the courts that a certain plea in bar must be sustained.

The Supreme Court in United States *v.* Rauscher (119 U. S., 407, 418) quoted the rule as laid down in Head Money cases with the approving words:

This whole subject is fully considered in the Head Money cases (112 U. S., 580), in which the effect of a treaty as a *part of the law of the land*, as distinguished from its aspect as *a mere contract between independent nations*, is expressed in the following language—

Citing also Chew Heong *v.* United States (112 U. S., 536, 540, 565). Again invoking the same principle in the Chinese Exclusion case (130 U. S., 581, 609), the court said:

Thus in the Head Money cases the court speaks of certain rights being in some instances conferred *upon the citizens or subjects* of one nation residing in the territorial limits of the other, which are "*capable of enforcement as between private parties in the courts of the country.*" "An illustration of this character," it adds, "is found in treaties which regulate the *mutual rights of citizens and subjects* of the contracting nations *in regard to rights of property by descent or inheritance* when the individuals concerned are aliens."

See also In re Cooper (143 U. S., 472, 500); Geofroy *v.* Riggs (133 U. S., 258, 267); Hauenstein *v.* Lynham (100 U. S., 483, 486–488).

There is, however, an obviously broad distinction between this class of cases stipulating a rule of law addressed the courts for the benefit and avail of the citizen or subject and a broad national promise to legislate or not legislate in a discriminatory way.

In the very nature of the case, a guaranty that our courts will or will not do a certain thing, usually if not always concerning property or personal rights of the *citizen or subject*, addressed to or stipulated on behalf of our courts, which alone adjudicate and enforce such rights, is vastly different from a promise that the *nation* which acts alone through Congress or its political agencies will or will not do certain things. The one, when stipulated, becomes a rule of action or law for the courts; the other a promise on behalf of the country, to be accordingly observed, ignored, or parleyed.

The expression by Chief Justice Chase, in Ware *v.* Hylton (3 Dallas, 3 U. S., 199, 242), is replete with pertinent thought:

No one can doubt that a treaty may stipulate that certain acts shall be done *by the legislature*, that other acts shall be done *by the executive*, and others *by the judiciary.*

Ex necessitate, a general treaty stipulation, like the familiar favored-nation clauses, covering an indefinite variety of acts, embraces, according to subject matter, all such. When invoked, compliance rests, according to the subject matter, with the particular governmental department—executive, legislative, or judicial—having cognizance thereof as so invoked. If a matter of import duties as this, of course, "Congress," being the sole constitutional source of such, is the only reparatory source. If the less important subject matter is one of mere executive jurisdiction and performance, such as is presented by the letter of the Attorney General, January 12, 1915, referred to in the majority opinion, the appropriate department, with or without advice of the Attorney General, acts.

Unquestionably a treaty which otherwise might be executory in character may, by express reference to an existing status, as in United States *v.* Percheman (7 Peters, 32 U. S., 51), or by express reference to existing or future legislative enactments, as in United States *v.* Forty-three Gallons of Whisky (93 U. S., 188, 191–196), so complete its terms by thus adopting as a part of the treaty which makes it a complete codification of rights on the particular subject matter as to be self-executing, but such is not the present case.

This legal status differs in no essential particular from those treaties wherein these rights are fully defined and made a rule of law for the courts in the treaty article itself, as in Hauenstein *v.* Lynham (100 U. S., 483, 486), and The *Peggy* (1 Cranch, 5 U. S., 102). See also Tucker *v.* Alexandroff (183 U. S., 424, 436); Charlton *v.* Kelly (229 U. S., 447).

There is nothing in Olsen *v.* Smith (195 U. S., 332) to the contrary. The fact that the court therein adopted another ground of decision does not argue the treaty article other than executory. To have decided that point also would have been a work of supererogation.

An executory treaty can, of course, be executed by legislation. The *treaty*, however, in such cases does not become the *municipal law* of the land enforcible by the courts, but the statute executing the treaty is such. The treaty remains executory, awaiting other applications, the statute being the admeasured compliance with its promise thus fulfilled as to the particular subject matter of the statute by the legislative department of the Government. The executing statute is the law and the whole law for the courts to construe and enforce. The courts have nothing to do with the treaty promise save that in cases of doubtful intent in the statute they can look to the treaty promise as an instructive guide. Chew Heong *v.* United States (112 U. S., 536–549).

Conceding and reaffirming all said in the majority opinion as to long recognition, approval, and action under these treaties, neither their age nor previous application nor recognition nor ratifying legislation executes an executory treaty. To hold otherwise rejects the obvious distinction between *ratification* and *execution* of a treaty; and in most of the enumerated instances clothes the executive departments of the Government with legislative powers—it being the exclusive province of Congress to execute executory treaties. Executory treaties can be executed solely by Congress legislating not mere approval of the treaty promise—ratification—but admeasuring the stipulated performance or reparation as to the particular subject matter, which statute and that alone becomes the municipal law of the land cognizable by the courts.

Of course, *every* treaty and treaty article is by the Constitution declared to be and is *of* the supreme laws of the land, but it does not follow that being such the *courts* must *enforce* all our laws, whether or not treaties, or that a treaty ceases to be a law when not enforcible by the courts. Indeed, the great majority of our laws are enforced by other tribunals than the courts and remain laws. From the very nature of treaties, being international *promises*, neither their construction nor enforcement naturally falls to the courts of either of the high contracting parties. As was said by the Supreme Court in Head Money Cases (112 U. S., 580–598):

> A treaty is *primarily* a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the Governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. *It is obvious that with all this the judicial courts have nothing to do and can give no redress.*

In fact, judicial construction and enforcement of treaty articles is comparatively exceptional, that office and duty being usually confined to other departments of the Government.

So that courts need entertain no fear nor assume any unwarranted jurisdiction upon the assumption that our treaty promises will otherwise go unheeded and our national honor be lost. The coordinate branches of the Government can quite as well be relied upon to do their duty, as they can not be assumed less vigilant, and certainly are much better qualified to enforce or parley infraterritorial demands.

Undoubtedly it is within the jurisdiction of the appropriate courts to take cognizance of and interpret all treaties and all treaty articles when a proper case is made, whether they be executory or self-executing. But having once determined a particular treaty article to be executory in character and so declared, the court is without

further jurisdiction to proceed *to enforce* the same or admeasure remedies thereunder, but must for that reason deny the relief sought. That was exactly the course pursued by Mr. Justice Curtis in Taylor *v.* Morton, supra, in passing upon a precisely similar article to those of the Russian treaty of 1832, and is the logical result of such a legal situation. Having examined the treaty articles and found them executory—promissory—a law, but not one cognizable by the courts, as said by Mr. Justice Curtis, "until such act shall be passed, the court is not at liberty to disregard *the existing laws* on the subject." See also Terlinden *v.* Ames (184 U. S., 270).

Aside from any reasoning upon the subject as to the executory or self-executing character of these treaty articles it may be deemed quite sufficient to justify the position taken, that the Supreme Court has many times approved a decision holding executory a precisely similar provision of the Russian treaty of December 18, 1832, Article VI (8 Stat., 444), which read:

> No higher or other duties shall be imposed on the importation into the United States of any article the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States, than are, or shall be, payable on the like article being the produce or manufacture of any other foreign country.

That was the treaty article the subject of Taylor *v.* Morton (Fed. Cas., 23, case No. 13799, p. 784), (Taylor *v.* Morton, 67 U. S., 481), opinion by Mr. Justice Curtis, of the Supreme Court, sitting in circuit, an opinion repeatedly and uniformly referred to by the Supreme Court in every similar case for the last half century as the leading case upon executory and self-executing treaty articles. Of this convention Mr. Justice Curtis said:

> The truth is that this clause in the treaty is *merely a contract, addressing itself to the legislative power.* The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence.

Advertence to the several treaty articles here invoked discloses that all and every one is promissory in terms and that no one of them by its own terms admeasures the relief here sought, to wit, *5 per cent* or other fixed definite reduction of duties upon certain imports. On the contrary, the quantum of relief sought, *5 per cent reduction*, is written in the statute and not the treaty. Nor is the stipulation one affecting the rights of the citizen or subject, but is a compact between nations.

But it is said that upon enactment of the statute the terms of the treaty immediately attach and at once apply in favor of the parties to the treaty; that if the treaty be a law of the land that the treaty and the act are laws *in pari materia*, and must be so considered.

Without yielding the position that in executed treaties the execut ing statute is the law and whole law for the courts, looking to th treaty only as a guide in construction *and not as a part of the law in pari materia*, let us here assume that the treaty article does no become such and consider before us all of the thus assumed law *i pari materia*, including the treaty article.

The importation was, let us say, of linen collars and cuffs, assesse under paragraph 277 of the act of 1913 at 30 per cent ad valorem imported in a vessel concededly not admitted to registration unde the laws of the United States but a vessel of a treaty country The law *in pari materia* is:

1. The first provision of the act, *supra*, declaring: "* * * there *shall* b levied, collected, and paid upon *all* articles when imported from *any foreig country* into the United States * * * *the rates of duty which are by th schedules and paragraphs of the dutiable list of this section prescribe namely:*"

2. Schedule J, paragraph 277, provides:

"Shirt collars and cuffs, composed in whole or in part of linen, 30 pe centum ad valorem."

3. J, subsection 7, provides: "That a discount of 5 per centum on all dutie imposed by this act shall be allowed on such goods, wares, and merchandis as shall be *imported in vessels admitted to registration under the laws of th United States: Provided*, That nothing in this subsection shall be so construe as to abrogate or in any manner impair or affect the provisions of any treat concluded between the United States and any foreign nation."

4. The treaty stipulations provide: 'That no higher or other duty shall b imposed upon goods imported into the United States in the vessels of the othe contracting nation than are charged when imported in vessels of the Unite States and reciprocally.'

Whether we read the applicable conspectus of law which the court may apply as confined to the statutes of Congress, looking only t the treaty, if necessary, as a guide to interpretation or as includin the treaty articles as a part of the law *in pari materia* the result wil be the same.

Subsection 7, it will be noted, *in express limited terms* carves ou an exception to the foregoing paragraphs, thus limiting the reduce duty to goods imported in "vessels admitted to registration unde the laws of the United States." That is the express limitation an scope of the words of the law before the court to be enforced—th only statutory exception to the preceding provisions of the tariff act The *courts* must and can only enforce the law as written upon th statute rolls. We must enforce the law and the whole thereof as w find it written. Obviously to grant the relief herein prayed for th court must disregard the comprehensive language of the first claus and paragraph 277 of the act, levying 30 per cent duty upon suc articles when imported from "any foreign country," or it mus

amend subsection 7 by striking out its express limitation to "vessels admitted to registration under the laws of the United States." If we look to the whole of the relevant acts of Congress we find an express levy of 30 per cent ad valorem upon these importations when imported from *any foreign country*, and a discount of 5 per cent *limited by the words of the statute* to those goods only imported *in vesels of American registry*. The simple issue is, Shall the courts strike out this limiting language of the statute, or amend by inserting the equivalent of "and also in the vessels of treaty nations," as Congress did in the acts of July 30, 1846, August 5, 1861, and in J, subsection 1, this act, quoted, *infra;* or, is not this a case for and shall not the courts await the action of Congress, which alone under the Constitution can amend its statutes? In the precise situation Mr. Justice Curtis said: "Until such act be passed, the court is not at liberty to disregard the existing law on the subject."

If we hold that the treaty articles are self-executing or are executed by the statute, or for any reason shall be read *in pari materia* with all the provisions of the act, as is done by the majority, incontrovertably, there is a conflict in this code of applicable law in that the treaty law gives this reduction to goods imported in the vessels of all, or rather to each, of the treaty nations, while the statute denies it to any one of these, and *in its express words limits* the discount to those goods only imported in vessels of American registry. The conflict is obvious. How shall the courts resolve this conflict? What canon of construction here controls the courts? That rule is well known and long established. Concededly these treaties were concluded prior to the enactment of the statute. The accepted rule is:

> While there is no provision in the Constitution as to the effect of conflict between treaties and acts of Congress, they are placed by that instrument upon the same footing, each being declared to be the supreme law of the land, so that neither having inherent superiority over the other, either may supersede the other, and in case of conflict the one which is later in date will control. (38 Cyc., 975; Ribas *v.* United States, 194 U. S., 315; Chae Chan Ping *v.* United States, 130 U. S., 581; Whitney *v.* Robertson, 124 U. S., 190; Ropes *v.* Clinch, 8 Blatch., 304; Fed. Cas., vol. 20, 1171, No. 12041, referred to with approval in and see Head Money Cases, 112 U. S., 580-598.)

The legal status and duty of the courts in such a condition of law is well settled. A treaty being but a contract between nations, the rules controlling the construction of treaties are in no wise occult or different from those applicable to contracts between individuals. (Tucker *v.* Alexandroff, 183 U. S., 424-437.)

Being a contract, enactment of a contravening statute does not abrogate the treaty. Treaties may be violated and not abrogated in the sense that they are denounced or terminated but continue to exist

as international contracts. As said by Mr. Justice Day (38 Cyc., 980):

> The violation of a treaty by one party does not of itself terminate or render void the treaty but makes it voidable at the option of the other party, who may waive or remit the infraction or demand satisfaction therefor. (Terlinden *v.* Ames, 184 U. S., 270.)

The statutory language confining the discount to American vessels undoubtedly conflicts with the treaty language promising not to so legislate. The duties of courts confronted with such a legislative status are clearly defined by the Supreme Court in Botiller *v.* Dominguez (130 U. S., 238–247), stating:

> With regard to the first of these propositions it may be said that so far as the act of Congress is in conflict with the treaty with Mexico, that is a matter in which *the court is bound to follow the statutory enactments of its own Government.* If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican Government, it was a matter of international concern *which the two States must determine by treaty or by such other means as enables one State to enforce upon another the obligations of a treaty.* This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States, as a sovereign power, chooses to disregard. (The Cherokee Tobacco, 11 Wall., 616; Taylor *v.* Morton, 2 Curtis, 454; Head Money cases, 112 U. S., 580–598. Whitney *v.* Robertson, 124 U. S., 190–195.)

Again, the Supreme Court in Thomas *v.* Gay (169 U. S., 264–271) reiterated the doctrine in the words:

> It is well settled that an act of Congress may supersede a prior treaty, and that *any questions that may arise are beyond the sphere of judicial cognizance,* and must be met by the political department of the Government.

In such emergencies the courts confine their jurisdiction and decrees to the words of the statute—here limited to American ships—and the treaty rights are left for determination and adjustment by the political powers of the Government.

It is inconceivable how, when the courts are bound to give effect to all the statutes and parts thereof and the statute expressly grants this bounty to "American" ships only, they can decree it also to foreign ships—and this whether the treaty be executory, self-executing, or executed.

That this position does not ignore the proviso to J subsection 7, which is simply and only a limiting rule of the construction to be given purview of the paragraph, adding nothing to but limiting its substantive force, will be a matter of later consideration.

The Senate, after taking advices from the Department of State and full debate, struck the House provision from the act. The debates indicate various motives therefor impelling different Senators. While some, like Senator John Sharp Williams, took the position that

the decadence of our merchant marine was due to such natural causes as the discovery of the uses of iron and steel in shipbuilding and our Civil War, and others, like Senator Gallinger and Senator Jones of Washington, attributed the decline to our early laws, treaties, and more or less questionable subventions and bounties given in the face of these treaty stipulations by foreign powers; nevertheless, these early acts of Congress permitting, and the reciprocity treaties made thereunder before recited, were generally held by Senators, to a great extent at least, responsible therefor. A uniform desire appeared to restore our prestige upon the sea, and an equally uniform expression was made that in order to return thereto these reciprocity treaties must first be eliminated. In no part of this debate, however, and in no line of any advices submitted to the Senate can it fairly be said that should the House provision become a law it was self-executing and would at once accrue to the benefit of the treaty nations. On the contrary, running through the entire proceedings is the implied assumption that that provision so contravened these treaties that retaliation and like discrimination would follow or reparation be sought, not through our courts but through diplomatic polemics. The probability of retaliation and discrimination which would nullify all advantage of the House provision seemed so strong with Senators that it, probably more than any other cause, led to the defeat of the House provision.

The attitude of the Senate, measured by a full review of the debates, seems accurately reflected by the report of the Finance Committee upon the subject, which was upheld by vote of the Senate. It States:

> Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent on all duties upon goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had treaties. In our opinion it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover, the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were, therefore, not only inviting an endless retaliation but a retaliation where our opponents would have had in nearly every case the better of it, and in many cases infinitely the better. (Report Senate Finance Committee, Cong. Rec., vol. 50, pt. 3, p. 2515, 63d Cong., 1st sess.)

The contravention by the House provision of existing treaties moved the Senate to action respecting the provision. Its respect and consideration for these treaties led it also to reject all amendments enacting abrogation in any limited time. Obviously, then, the

Senate attitude was that these treaties should be abrogated *by consent alone*.

But, in passing, what did the Senate attitude argue as to these treaty articles being executory or self-executing? If the Senate deemed the House provision executed these treaties, or that they were self-executing and were not thereby abrogated, why report that retaliation would follow? Is an act of Congress which the Senate reports so contravenes our treaties as would lead to retaliation in the view of the Senate an act executing a treaty? Would retaliation follow an enactment that executed a treaty thereby reducing duties on foreign imports 5 per cent and giving an advantage to all treaty nations of 5 per cent on our imported goods carried by their vessels? As between the high contracting powers in that view what *discrimination* was there? Nor did the letters of Secretary of the Treasury, Mr. McAdoo, nor Mr. John Bassett Moore (Cong. Rec., vol. 50, pt. 5, pp. 4237–4263), claim or imply that the House provision, if enacted, would immediately inure to the benefit of the treaty nations; that the treaty articles were self-executing or would be executed by that enactment. Contemplating retaliation, protest, and diplomatic parley, they must have explicitly assumed the contrary.

The idea seemed general and paramount with Senators that these treaties were an insuperable objection to the present enactment of the House provision and its subsequent immediate operation and effect as a statute.

In this mind of the respective Houses of Congress the House bill and Senate act, as stated, went to conference, was reported to the two Houses, adopted, and became a law, subsection 7 being adopted as the best solution of their respective ideas under existing conditions.

The fact that it is the House provision with a proviso relating to the treaties which the Senate deemed, and on vote held, an objection to present enactment of the House provision seems significant that the conferees combined therein the ideas of the two Houses; that is, to grant the discount *when* the treaties ceased to be an objection thereto.

Whatever view the Senate may have taken of the effect of the House provision upon the treaty articles, whether executory or self-executing and thereby contravened (certainly not executory and thereby executed), subsection 7 was intended to meet the dual purpose of the House to enact a discriminating duty in favor of our ships and meet the objections thereto by the Senate that the integrity and promise of the treaties should not be disturbed. That the purpose of the House is therein maintained is testified by the entire House provision being retained *in haec verba*. Did the Congress having thus decreed this effect, by the proviso execute these treaty

articles thereby extending the discount to the vessels of all these treaty nations as well as ours; or, by postponing the operation of the House provisions until the treaty articles could be eliminated?

It is said in the opinion of the majority: "If these treaties require legislative action to give force and effect thereto, they have it in the proviso to the subsection as well as in the numerous preceding tariff acts." That a proviso declaring that nothing in its contents or its purview constituting the subsection "shall be construed to abrogate or in any manner impair or affect" a treaty executes that treaty, would in addition to the foregoing reasons seem to be refuted by the very words employed. Congress in similar situations impelled by motives to execute similar treaties has employed language of far different import, clear and unmistakable. In 1903 by act of December 17 (33 Stats., 3, c. 1), Congress executed the Cuban treaty, similar in import and classed with these treaty articles in the cases here presented, by enacting as a statute the precise terms and fixed rates of duty agreed by the treaty to be granted Cuba (33 Stats., 3, c. 1). Likewise, when by "An act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes," July 26, 1911, Congress executed the reciprocity agreement with Canada, it enacted the precise rates and all the terms prescribed by the treaty *as a Federal statute.* Why? Because when a treaty article is executed and becomes a rule of action or municipal law, cognizable and enforcible by the courts, the courts look to the act alone and not the treaty for the law of the case, referring only to the treaty as a guide in doubtful construction.

Looking now to subsection 7, how does that compare with the executing statutes of the Cuban and Canadian treaties? Its grant is expressly confined to "vessels of *American registry*," and *the language of the statute* measures the powers of the court. How different those acts spreading upon the statutes cognizable by the courts, statutory admeasurement in words and figures of each treaty promise, and this claimed executing act providing that "nothing in the subsection shall be construed to *in any manner affect any treaty with any nation.*" *It might recognize but probably not even ratify, not to say execute, a treaty article.*

Moreover, whenever Congress has desired to extend such bounties to treaty nations in conformity with treaty promises, it has used apt and no uncertain words to that end. The wording of prior and contemporaneous statutes *in pari materia* are always legitimate and valuable guidances in statutory interpretation. (Reiche *v.* Smythe, 113 Wall., 80 U. S., 162–165; United States *v.* St. Anthony Railroad Co., 192 U. S., 524.)

Congress on previous occasions has legislated upon the subject of favoring American ships, then as now confronted with these treaty

stipulations. It is significant that, on those occasions as well as in this very act, when Congress intended the treaty nations to equally enjoy this bounty it *in express terms so enacted.*

That such has been the particular caution upon part of Congress in all discriminating-duty acts from 1816 to date is admitted by the majority opinion, express reference being made to the tariff act of 1897. Other particular instances follow.

The tariff act of Congress passed on the 30th day of July, 1846, has the following section:

Schedule 1. (Exempt from duty.) * * * Coffee and tea, when imported direct from the place of their growth or production in American vessels *or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties*, tonnage, and other charges. * * *

So the act of August 5, 1861, section 3, provided:

SEC. 3. *And be it further enacted*, That all articles, goods, wares, and merchandise imported from beyond the Cape of Good Hope *in foreign vessels not entitled by reciprocal treaties to be exempt from discriminating duties*, tonnage, and other charges, and all other articles, goods, wares, and merchandise not imported direct from the place of their growth or production *or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties*, tonnage, and other charges shall be subject to pay, in addition to the duties imposed by this act, ten per centum ad valorem: *Provided*, That this rule shall not apply to goods, wares, and merchandise imported from beyond the Cape of Good Hope in American vessels.

In the act here under consideration—tariff act of 1913, Section IV, J, subsection 1, levying a discriminating duty upon goods imported in vessels not of the United States—it is provided:

J. Subsection 1. That a discriminating duty of 10 per centum ad valorem in addition to the duties imposed by law shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States or which, being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; *but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation, by treaty or convention or act of Congress, to be entered in the ports of the United States* on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.

Here we have a legislative interpretation by Congress extending over a period of more than half a century, and exercised in the very act under review, that an enactment expressly extending and confining a bounty to or discrimination in favor of "American" vessels would not without express words extend to treaty-nation vessels. How different this from the language in J, subsection 7? In the one Congress by express, apt words extended the same privileges to treaty

nation vessels; in the other it not only failed to so do, but expressly enjoined the courts from construing any treaty as being "affected" by its enactment; in other words, the treaties were to stand and be effective exactly as before, when and as though there was no such enactment.

It may here be opportune to refer to the case of Oldfield *v.* Marriott, (10 Howard, 51 U. S., 146), quoted at length by counsel for importers and greatly relied upon by both them and the majority of this court to sustain the position that these treaty articles are executed and put in motion by this enactment. From my limited point of view it shows exactly the contrary. It construed the provision of the act of June 30, 1846, *supra*, as affecting the treaty with Portugal. The court held it did not set in motion the treaty, because the treaty terms applied to ship tonnage and not duties on goods. All the language of the court as to the application of the treaty had it applied to duties on goods here quoted and cited, *must be read in connection with the statute, which expressly extended its exemption from duties not only to "American vessels" but to "foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties."* The case is against the majority contention. If the treaty article was sufficient *per se*, as here held, to extend the exemption, why did Congress expressly extend it to treaty ships? Obviously because Congress then, as in all similar acts, deemed these words essential if treaty ships were to receive the exemption.

Let us examine the subsection thus enacted, permitting its words to speak as their own interpreter. The words of every statute are the primary guidance in its interpretation. The proviso reads:

> *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

It is not substantive. It neither levies a duty nor grants relief from such. *It is expressly a rule of construction addressed to and binding upon all courts and tribunals* called upon to apply the purview to which it is added, the House provision. It was neither intended to add to nor detract from the House provision, but to control its construction. To construe is to give effect to a statute, hence the proviso here is in words confined to the office of controlling the effect to be given the House provision. *Without the proviso it would be given immediate effect.* With and by it was other than the same effect contemplated? In terms it is confined to the purview and does not change or purport to change or control the construction to be given the treaties. Let us analyze this rule of construction. In terms it is related only to "concluded" treaties. The treaty-making power is vested by the Constitution in the President and the

Senate. After negotiation by the President or his agencies it is submitted for ratification by the Senate. Mr. Justice Day states (38 Cyc., 967): "After ratification by each of the contracting powers there must be an exchange of these ratifications, which constitutes the delivery and *conclusion* of the treaty, and up to this time the treaty is *inchoate* and may never take effect." Armstrong *v.* Bidwell (124 Fed., 690); Ex parte Ortiz (100 Fed., 955). He likewise states a treaty may be "*incomplete*" for want of approval by the House of Representatives in matters requiring their approval under the Constitution. (38 Cyc., 972.) Such treaties are often termed "unconstitutional," whereas they are in fact valid so far as completed, but incomplete as to the particular article. The question would not seem to arise here, for there is no question that these treaties have been duly "concluded," though possibly "incomplete," and that is the sole requirement of the proviso.

I am in perfect accord with the conclusion asserted in the majority opinion, that "We are of the opinion that, considering the constitutional challenge alone, these treaties are clearly within the right of the treaty-making power to negotiate and ratify, and that when duly proclaimel in accordance with their terms they are, until denounced or until they expire by their own limitation, or are by express or necessary implication repealed by act of Congress, operative and in force as the law of the land."

Of course all these *treaties* as a whole are, and ever since respectively concluded have been, regarded as binding upon the nation, and many of their articles have been invoked and observed by other branches of the Government. But in no case has any *court* held the particular articles here in question of these treaties complete for the purpose herein claimed without express legislative action unqualifiedly and literally extending the claimed favor to the treaty nations. Undoubtedly, in their making, the treaty-making power was within its constitutional rights, and as the treaty articles invoked to-day stand, they are not unconstitutional, but the converse; but, until approved by both Houses of Congress, they can not be made the basis of such a claim *in the courts*. As suggested by the Supreme Court in De Lima *v.* Bidwell (182 U. S., 1, 198), the treaty article probably obligated *Congress* to enact in accordance with the treaty promise, and that is precisely the situation here. The treaty article *is valid, binding, and constitutional*, but it is a promise that Congress under the Constitution must consider and fulfill in the particular case according to its measure of justice; and until Congress so acts the treaty article is an *incomplete* law *in so far as the courts are concerned*. Until acted upon in a case like this it is addressed to Congress alone. The acts of Congress herein concern the duty-import laws. *Their extent is under the Constitution literally and legally defined entirely*

by the words of the acts of Congress. Under the Constitution neither the treaty-making power nor any court but Congress alone is constitutionally empowered to change, enlarge, or modify the words of Congress as written in such statutes.

Upon this and the point that the treaty-making power can not usurp the functions of Congress and, by a treaty law, provide that which the Constitution has confided to Congress alone to enact, the decision of Mr. Justice McLean, sitting in circuit, in Turner *v.* American Baptist Missionary Society (5 McLean, 344; Fed. Cas., 344, No. 14251) seems convincing:

> A treaty under the Federal Constitution is declared to be the supreme law of the land. This unquestionably applied to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not be the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money can not be appropriated by the treaty-making power. This results from the limitations of our Government. The action of no department of the Government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended that an ordinary act of Congress without the signature of the President was a law as that a treaty which engages to pay a sum of money is in itself a law. And in such case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act upon their own responsibility and not upon the responsibility of the treaty-making power. It can not bind or control the legislative action in this respect, and every foreign Government may be presumed to know that so far as the treaty stipulates to pay money the legislative sanction is required.

The treaty articles are international promises which, until "Congress" acts, admeasuring and enacting compliance, remain such, and are not within the jurisdiction of our courts and thereby therein available to the citizen or subject.

So that if we adopt the doctrine of the majority of necessarily reading the treaty and statute law together, we have no efficacious treaty law, for it has not *as yet* been constitutionally enacted as a complete law for the invoked purposes. It may be obligatory upon Congress or the Executive; but, for the courts, not within their cognizance until duly enacted in accordance with the constitutional requirements as to the enactment of *all* import revenue laws. For the purpose of this class of cases, therefore, these treaty articles are not *unconstitutional* but *incomplete* under the Constitution as a municipal law of the land enforcible in the courts. They are for the political departments of the Government.

To continue the diversion to the conclusion of the immediate subject matter it may be said that while the Supreme Court has not expressly passed upon this controversy between the House and Sen-

ate it has nevertheless held the power to fix import duties so sacredly vested by the Constitution in "Congress" that it upheld the reciprocity treaties of recent years *solely on the grounds that Congress had previously fixed the exact alternative or conditional rates of duty*, leaving to the treaty-making and executing powers the determination only of the time when or condition upon which *one or the other of the schedules of or rates fixed by Congress* should be operative. That Congress could not otherwise even delegate this constitutional duty even to the treaty-making power. Field *v.* Clark (143 U. S., 649, 692, et seq.). Of course, Congress may refer to a treaty or treaties or articles thereof, and the latter alike may make reference to a statute as a part of the enactment or treaty, respectively, thereby making the respective laws (treaty or statute) a part of the same. But assuredly that was not this language, as is shown when we proceed to consider the same.

Other words of limitation of the proviso are that the subsection shall not be so construed as to "abrogate" or in any manner "impair" or "affect" the provisions of the treaties. It is a fundamental rule of construction that every word of a statute must be given some effect. The rule is so elementary that citation seems surplusage. The meaning of and distinction between "abrogate" and "impair," as applied to treaties, is patent and unimportant. The rule stated requires that a different meaning or effect be given the word "affect." Lexicographically the definitions are singularly uniform, as follows: Webster's New International Dictionary: "Affect. * * * To lay hold on; to act upon; to produce an effect upon; * * *." Standard Dictionary, Twentieth Century Edition: "Affect. To have an effect upon; act upon; lay hold of; * * *." Worcester's Dictionary: "Affect. To act upon; * * *." The Century Dictionary and Cyclopedia: "Affect. * * * To act upon; * * *." Judicially these definitions and their common import have naturally been followed, save in cases where the context constrained a more limited meaning. Thus there are a class of cases where, being so constrained by the context and obvious intent as used, "affect" has been confined to the more limited meaning to "injuriously" or "adversely" affect. (In re Davis' Estate, 32 Oklahoma, 209; Nelson Bennet Co. *v.* Twin Falls Land & Water Co., 13 Idaho, 767; Baird *v.* St. Louis Hospital Association, 116 Mo., 419.) Where, however, not so constrained by the context, the word has uniformly been given its broad natural meaning. Thus in Sacramento Terminal Co. *v.* McDougall (19 Cal., 562) it was held that the word "affect" meant "to produce an effect upon," to "act upon." In Lyons *v.* Elston (211 Mass., 478) it was held that the word "affected" signified "acted upon, moved or changed." The Iowa Supreme Court has held: "To 'affect' does not mean to impair, but to work a change upon." "A

right is affected if it is either enlarged or abridged." (Holland *v.* Dickerson, 41 Iowa, 367; Clark *v.* Riddle, 101 Iowa, 270.) The doctrine seems to be accurately stated by the Missouri Court of Appeals, stating: "Undoubtedly a party may be beneficially affected, as well as injuriously affected, by anything, and the word '*affect*' standing alone, may be said to be equivocal." (Tyler *v.* Wells, 2 Mo. Appls. Repts., 526.) See also to the same effect: Home Building and Loan Association *v.* Nolan (21 Mont., 205); Canniff *v.* City of New York (4 E. D. Smith, 430–9); Westbury *v.* Simmons (35 S. E., 764). So the United States Circuit Court of Appeals for the Fourth Circuit states: "'Shall not affect' means shall not diminish or enlarge." The same doctrine was announced by the Supreme Court. The controversy grew out of the titles settled by Federal grant to the occupants of the territory ceded by France to this country in 1803, which act provided that "nothing herein contained shall be construed to *affect* the rights of any person claiming such lands," etc., confirmed by a designated commission. The court said:

> How "affect" them? If in the sense of simply acting upon them, then his title is excepted from the operation of the act. But this exception is *not within the reason of the proviso*, and the court is at liberty to adopt another construction, if it may be fairly done, by giving full and just effect to the words used. * * * It is unnecessary to give the various definitions of the word "affect." It is enough to say that it is often used in the sense of acting injuriously upon persons and things, and in this sense we are all of the opinion it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso. Ryan et al. *v.* Carter et al. (93 U. S., 78).

The indisputable deduction from this peculiarly consistent line of adjudications is that the word "affect" when used in a statute is to be given its natural significance unless the plain intent of the statute indicates a more limited use. If we are to give heed to that cardinal principle of construction, that where possible every phrase and word of a statute must be given some effect not had by the others, there is no escape from the construction that since the entire and every degree of injurious and adverse effect upon a treaty is covered by "abrogate" and "in any manner impair," in order to give any effect whatever to the word "affect," not embraced by the others, such can only be done by assigning its use to the field of advantageous as well as injurious and adverse effects.

In this case, however, the court is not at liberty to select of these definitions, for the plain intent of the Congress as to its employment of the word is expressly written in the statute. It states "that nothing in this subsection shall be so construed as to * * * *in any manner* * * * *affect* the provisions of any treaty * * *." In the presence of this unmistakable postulate *written in a rule of construction* expressly addressed by the Congress to all courts before

whom this statute may duly come for interpretation, it is not difficult to understand the intent of the Congress to have here used the word "affect," and we have no discretion but must apply the word in its broad, natural sense often approved by the courts, "to act upon"; "to produce an effect upon"; "to work a change upon"; "to enlarge or diminish." We are, therefore, upon proceeding to construe subdivision 7, confronted by the congressional condition that no construction shall be put thereupon which will hold said proviso as "acting upon," or "producing any effect upon," or "working any change upon," or "enlarging or diminishing" said treaty provisions.

I am unable to concur when the court, conceding that a word is frequently legally applied in different senses, proceeding under an express statutory rule of construction to give it effect "in any manner" applicable, can select one meaning and reject other admitted senses of the word. It is to my mind proceeding in direct disregard of and in conflict with the very words of the act.

Some latitude of application must, of course, be given that fundamental rule of statutory interpretation, which most of all such rules acquits of tautology and pays tribute to the literary precision of the legislature, that each and every word in a statute must be given *some* effect different from and not embraced within other words of the act. United States *v.* Gooding (12 Wheat., 460); Bend *v.* Hoyt (13 Pet., 263); Hardy *v.* Hoyt (13 Pet., 292); Early *v.* Doe (16 How., 610); Eyster *v.* Centennial Board of Finance (94 U. S., 500); Wilmot *v.* Mudge (103 U. S., 217); East Tenn., etc., R. Co. *v.* Interstate Commerce Comm. (181 U. S., 1); Murphy *v.* Utter (186 U. S., 95); Market Co. *v.* Hoffman (101 U. S., 112); Stephens *v.* Cherokee Nation (174 U. S., 445); Adams *v.* Woods (2 Cranch., 336).

We are unavoidably confronted with the dilemma that these treaty provisions are certainly either executory or self-executing or executed by subsection 7 and must be so construed. We are confronted with the further fact that if any rule of construction is applied to this statute *which gives it present operation* that it will "affect" these treaties however they may be construed. There seems no escape from these results.

If executory and not executed by the subsection, its present operation "affects" and contravenes the treaty promises, vitalizes and makes them the foundation of claims of equal treatment upon the legislative department of the Government or reparation by the Executive.

If self-executing, upon the subsection being given operation, the subsection equally "affects" them as they would be as thus construed, a part of the municipal law of the land and, upon operation of the subsection, be contravened or repealed.

If executory and we construe subsection 7 as executing the treaty articles, it "affects" the treaty articles, for, if the enactment so executes, it must necessarily "act upon" them. Moreover, by executing an executory treaty promise the enactment executing "enlarges" the treaty promise, or national obligation, theretofore enforcible or performed only by legislation and diplomacy, and not the courts, by enacting the treaty promise into municipal law as a Federal statute enforceable by the courts establishing, which it must do to so execute, as a municipal law, the measure of reparation for breach of the particular promise. An executing statute therefore "affects" an executory treaty by prescribing the penalty of its breach as to the particular subject matter, affording a new tribunal for its determination and, usually, the determined reparation.

In this connection it would seem an appropriate place in the consideration of these appeals to observe that after stating the case and reciting the various issues presented the majority opinion proceeds to announce and support with ample authorities several well-known and universally accepted rules of statutory construction; and then states: "The force and application of these rules will be kept in mind in the discussion." The following pages and the conclusion reached attest this observance and under ordinary circumstances would seem indubitable. The difficulty, however, which arises seems to be that the Congress by this *proviso* has unequivocally and affirmatively denied the courts the right to invoke in the construction of this statute any of the well-known rules of construction which tend to a certain conclusion, which conclusion each and all of those rules invoked by the majority opinion tend and are held to establish. The plain unmistakable mandate of the proviso addressed the courts is that no rule of construction shall be adopted which will cause this statute to *affect* any existing treaties; nevertheless, the opinion of the majority seems to adopt those rules of construction which as applied give this statute such force and effect as acts upon and vitalizes these dormant promissory treaty provisions, laws in repose, and makes them the foundation not only of claims against this Government but, they hold, of such claims enforcible by decree of the courts.

The inquiry is prompted, What, if any, recognized rule of construction is applicable to this subsection which will give this provision effect, harmonize the manifest purposes of the Congress, and the language it has here enacted?

We recapitulate, to emphasize the congressional purpose, that this provision of law emanated from a conference between the House standing for the purview of the provision and the Senate opposing it upon the ground, chiefly, that it would contravene our treaty promises, and thereby, so long as those treaties existed, would bring upon us retaliation which would not only be injurious to our com-

merce but defeat the very purpose of the law. We know that the Senate had rejected the proposition to either legislatively terminate those treaties or fix a limited time for the President to annul them upon notice, thereby indicating the Senate's unwillingness to abrogate these treaty articles other than by mutual agreement. I am unable to read the amendments rejected by the Senate as resulting that it "had expressly refused to provide for the orderly abrogation of these treaties" as interpreted by the majority. The one provided immediate abrogation, the other directed such within the treaty time, one year. Their rejection seemed a declaration of the Senate against *abrupt* or limited abrogation, but not abrogation by agreement or consent. The Senate being constitutionally a part of the treaty-making power and the House not, naturally was more tenacious of its previous acts. Subsection 7 represents these combined views, to wit, that of the House, subvention for our merchant marine, and that of the Senate, that it should not become effective so long as it "abrogated or in any manner impaired or affected any treaty with any foreign nation."

It therefore seems incontrovertible that any rule of construction giving effect *in præsenti* to this subsection would be violative of the congressional purpose in that it would of necessity abrogate, impair, or in some manner affect the treaties. What rule of construction avoids that effect?

In passing it may be noted that the construction put upon this proviso by the opinion of the majority *extending* the purview to treaty vessels is in violation of the usual construction of provisos. "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to *qualify the operation of the statute in some particular.*" Georgia Banking Co. *v.* Smith (128 U. S., 174–181); Minis *v.* United States (15 Peters, 40 U. S., 423–425). The construction given does not qualify but extends the purview from American to all treaty vessels.

A familiar office of a proviso is to "so qualify the operation of the statute" as to suspend its operation until its terms are satisfied. Thus in Voorhees *v.* United States Bank (10 Peters, 35 U. S., 449–471) the Supreme Court states: "The various acts required to be done, previous to sale, are prescribed by a proviso, which in deeds *and laws* is a limitation or exception to a grant made or authority conferred; the effect of which is to declare that the one shall not operate, nor the other be exercised, unless in the case provided." In Austin *v.* United States (155 U. S., 417–31) this opinion was quoted with approval. The Supreme Court of New Jersey in Snyder *v.* Insurance Co. (59 N. J. L., 544–548) declared: "*Proviso*, when used always implies a condition unless subsequent words change it to

covenant." The Supreme Court of New York, in Waffle *v.* Goble (53 Barbour, 517–522), epitomized the functions of a proviso as follows: "A proviso in a statute always *implies a condition*, unless modified by subsequent words. The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enactment, whereas the latter only *defeats the operation of the enactment conditionally*. (*Bouv. Law Dict., tit. 'Proviso,' and cases there cited.*) A proviso is something engrafted on a preceding enactment by way of limitation or otherwise, and is held to operate as a repeal of the purview of the act where it is inconsistent with it, as expressing the last intention of the lawgiver. (*Smith's Commentaries on Statute and Constitutional Law*, 712)."

Bouvier's Law Dictionary, vol. 2, article Proviso, succinctly states: "A proviso differs from an exception; 1. * * * An exception exempts, absolutely, from the operation of an engagement *or an enactment;* a proviso *defeats their operation, conditionally.*" An apt illustration of a congressional act upon condition which might or might not ever become effective is illustrated in Dunlap *v.* United States (173 U. S., 65) and cases therein cited.

So that if we construe this subsection as one upon the condition that it shall not become effective so long as it contravenes any of these treaties, which condition is prescribed by the proviso, the latter is satisfied and conditional *effect* is given the subsection. *Thus we neither declare the act merely a declaration of policy nor void nor give to the proviso the objectionable construction that it is repugnant to the purview as inhibited by Dollar Savings Bank v. United States (19 Wall., 86 U. S., 227), but declare it a substantive law upon condition to take effect when that condition is satisfied.*

Moreover, this construction does not deny but gives application and full force and effect to each and all of the rules of construction applicable to the subsection enumerated by the majority, to wit: "It will not be held that the lawmaking body has done a vain thing, but that it intends that its acts and every part thereof are valid and capable of being carried into effect" (Lewis's Sutherland Statutory Construction, sec. 497); "that the statute is so construed as to sustain rather than defeat it, to give it operation"—*in futuro*—and "is not treated as meaningless"; Bird *v.* United States (187 U. S., 118); Bernier *v.* Bernier (147 U. S., 242); Platt *v.* Union Pacific Railroad Co. (99 U. S., 48); Market Co. *v.* Hoffman (101 U. S., 112); Louisville Water Co. *v.* Clark (143 U. S., 1); "that it rules the excepted thing to be within the general words of the purview and that the proviso is not repugnant to the body of the section"; Minis *v.* United States (15 Peters, 40 U. S., 423); Greely *v.* Thompson (10 How., 51 U. S., 225–236); Dollar Savings Bank *v.* United States (19 Wall., 86 U. S., 227); Sonneborn Sons *v.* United States (1 Ct. Cust.

Appls., 443; T. D., 31504); Interstate Commerce Commission *v.* Baird (194 U. S., 25–36); and "permits the statute itself to furnish its own rule of interpretation." (Lewis's Sutherland Statutory Construction, sec. 366.)

The construction reading this subsection as a statute upon condition prescribed by its proviso places it in the same class with all legislation upon the subject of discriminating and retaliatory duties from 1815 to date. *Almost if not every act of Congress during said period and now in force providing for the levy or withdrawal of discriminating duties was and is a statute upon condition, and this condition was usually, if not uniformly, effected or extinguished by diplomacy and treaty pourparlance.* That was true of the acts of 1815, 1824, and 1828. It is equally true of section 4228, Revised Statutes, embodying the features of the act of 1828, now in force, proclamation of the fulfillment of the condition precedent to its application to Cuba of which was made as late as July 3, 1902 (32 U. S. Stat., pt. 2, p. 2013).

That class of legislation has long since and continuously been upheld by the Supreme Court, so that it is no longer questioned that Congress can enact legislation to become effective or suspended or repealed upon certain contingencies either named in the act itself or in other acts or implied. (Brown *v.* Barry, 3 Dallas, 3 U. S., 365; Levey *v.* Stockslager, 129 U. S., 470.) So Congress may rest the vitality and force of an act upon a condition that may not be acted upon. (Beaty *v.* Knowler, 4 Peters, 29 U. S., 152.) If there were necessity to justify or vindicate the wisdom of such legislation, that has long since been done by the Supreme Court in Field *v.* Clark. The court said:

> There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation. (Field *v.* Clark, 143 U. S., 649–694; United States *v.* American Sugar Refining Co., 202 U. S., 563.)

Indeed, in this very act we find numerous instances of similar conditional legislation, and this construction fully harmonizes this subsection with the other provisions of the act. J, subsection 1, supra, is a conspicuous instance relating to retaliatory duties conditionally levied, and numerous instances occur in other parts of the act. Indeed, this class of legislation seems to have particularly actuated the framers of this more than any previous tariff act.

There would, therefore, seem to be no escape from the conclusion that this subvention was granted vessels of American registry to take effect only upon these reciprocal treaty promises being removed or satisfied.

It was peculiarly natural that since any possible contributing legislative cause to the decadent condition of our merchant marine was

wrought by conditional legislation permitting and being followed by reciprocity treaties contributing thereto, that the repairment of that decadence should be approached by like conditional legislation looking to the elimination of those treaties, contemplating like pourparlance, and this reflex sheds no little light on the congressional intent in subsection 7.

But it is strenuously urged by counsel for the importers that this conclusion is negatived in that "the termination of a treaty on notice is the function of Congress, and Congress having in this particular instance, after full consideration and knowledge, not only deliberately refused to exercise its prerogatives, but having adopted a proviso indicating its purpose not to abrogate or impair existing treaties," etc., hence the treaty-making power was left powerless to abrogate *or negotiate* substitute treaty provisions. *It certainly can not be seriously contended that the failure of Congress to legislate, or any affirmative legislation by Congress, can nullify or arrest in any degree the functions and activities of the treaty-making power, including that of substitute treaties vested by the Constitution in the President and the Senate.* Indeed, that the notice of abrogation to terminate a treaty, while as said by Moore (International Law Digest, vol. 5, p. 322), is *usually* authorized by joint resolution of Congress, that has not always been the case, and when done unquestioned. Articles VIII and XII, inclusive, of the treaty of 1850 between the United States and Switzerland, being the most favored nation and reciprocal duty provisions thereof, were by notice pursuant thereto given March 23, 1899, terminated by the Executive of this country and no congressional action had. (Malloy's Treaties, vol. 2, p. 1763.)

The treaty of 1832 between the United States and Russia was terminated by notice pursuant thereto, given December 17, 1911, by the Executive of this country, and not until afterwards approved by the Congress by joint resolution (37 Stat., 627).

Aside from these considerations, all these suggested objections find ready answer in the provisions of the act itself, which strongly corroborate, if they do not demonstrate, the congressional purpose. Assuming that subsection 7 standing alone suggested and authorized no negotiations whereby these reciprocal treaties could be eliminated, in construing an act it is elementary that we must read all parts together to ascertain the congressional purpose, and by so doing we find such a provision in subsection 7 would have been surplusage, for Congress had already in subsection A, this section, fully authorized and empowered the President to negotiate trade agreements looking to further reciprocal expansion of trade and commerce. Why, then, here reiterate this grant of power?

So that, reading all the provisions of the act together, we find a consistent scheme of legislation. J, subsection 1, enacting a discriminating duty of 10 per cent to prevent discrimination against this country, long a provision of our statutes, and here reenacted, a statute upon condition, which condition was not named therein, but intended to be, and which has uniformly been removed by diplomatic parlance; subsection 7, granting a discount upon conditions not named therein, intended to be as customarily removed by diplomatic parlance, which by subsection 1 was authorized and its ratification expressly therein provided.

We may here pause to inquire why, if Congress did not understand that it had authorized and anticipated the negotiation of reciprocal commercial treaties affecting the public revenues, it enacted as a proviso as to all such treaties negotiated under section IV, paragraph A, "that said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection"?

And so the Sixty-third Congress embarked upon the task, in so far as it could by legislation be accomplished, of restoring the American merchant marine to its former prestige by the natural method of returning thereto by the same course we departed therefrom, without violating any national treaty promise, but by keeping faith with all nations; without violent interruption of trade and commerce, but with a gradual adjustment; not in a hapless way, without thorough knowledge of all the secret as well as obvious causes of our difficulty, but in a studious way ascertaining and eliminating as we proceed all alleged discriminations in violation of our present national conventions and other contributing causes and conditions.

The next inquiry in order following this conclusion is, if the operation of the provision is thus suspended, is it conditional upon the elimination of *all* the treaties or does it become effective as to each country as the particular treaty permits? If the latter, it is of course presently effective as to all nontreaty nations; that is, nations without the particular treaty article. The answer to this inquiry seems to be made by the language of the proviso itself. The effect thereof being to postpone application of the paragraph until the conditions written in the proviso are satisfied, it follows that it must be suspended so long as it 'shall abrogate or in any manner impair or affect *the provisions* of *any* treaty concluded between the United States and *any* foreign nation.' That is, it is not effective *in praesenti* as to any nation or its vessels. The statute construes itself, and "The courts can afford no redress." Whether the complaining nation has just cause of complaint or *our country was justified in its legislation, are not matters for judicial cognizance.* (Whitney *v.* Robertson, 124 U. S., 190–194.)

But, it is said by the majority of this construction, that "a construction which leads to that result manifestly is at war with the rule that a proviso shall not be held to defeat the purview of a statute," etc. If to *suspend* means *defeat*, that argument is applicable. If suspend does not mean defeat, the argument has no place here. The approved language of the Supreme Court, Field *v.* Clark, seems more in point:

> Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. (Field *v.* Clark, 143 U. S., 649, 694.)

It is further urged with much assurance that if this construction is adopted as to subsection 7 the like construction must be put upon the similar language of subsection B, Section IV, in consequence whereof, as that subsection relates to the whole tariff act, its operation would be suspended until the Cuban treaty is eliminated. The contention overlooks controlling differences between the respective treaties and subsections. The Cuban treaty in its full import was at the time of this enactment not a promissory law in repose, but an executed treaty, the executing statute being in full operation and effect, and it is so continued *ex vi termini* under this act regardless of subsection 7. There is therefore nothing in subsection 7 which does abrogate, impair, or *in any manner affect* the Cuban treaty by acting upon or calling it into effect. This would seem conclusive, but instructive lessons are here afforded.

The Cuban treaty signed December 11, 1902 (33 Stat., 2136–2142), was by act of Congress ratified and executed December 17, 1903 (32 Stat., 3, ch. 1). That act, as previously stated, enacted as a Federal municipal statute all the provisions of the Cuban treaty fixing in definite figures and terms the automatically preferential rates between Cuba and the United States. It thus became a statute cognizable by our courts. The promissory treaty articles were thus executed and recourse afforded to the courts by a substitute municipal law for enforcement.

The schedule of the tariff act of 1909 would have repealed this act and relegated Cuba to reclamation by retaliation or parlance but for section 3 of that act, precisely in the language of J, subsection 7. So the schedules of the act of 1913 would have repealed, with like effect upon the Cuban treaty, the act of December 17, 1903, executing the Cuban treaty. But Congress incorporated in the act of 1913, subsection B, former section 3 of the act of 1909.

Subsection B, however, differs crucially from subsection 7 in that it not only provides it shall not be construed "to abrogate or in any manner impair or affect the provisions" of the Cuban treaty, but in

addition extends those inhibitions to "*the provisions of the act of Congress heretofore passed for the execution*" of the Cuban treaty.

The effect of this *additional* provision was to retain in force and, in effect, reenact the act of December 17, 1903, as a part of the tariff act of 1909, and again as a part of the present act of 1913. In this legislative status, when the municipal law of the United States affecting Cuba is laid before the courts, there is included as a part of the tariff act of 1913 the act of December 17, 1903. The promissory treaty articles are not important or a part of that law or relevant save as constructive indices. Without reference to any treaty article we read, as before, the duty on linen cuffs (products and imported from Cuba) under paragraph 277 is 30 per cent. We read not from the treaties, but from the statutes—act of December 17, 1903—that a 20 per cent reduction *is allowed by act of Congress*, expressly retained in force by subsection B as a part of the tariff act of 1913. Here we find an executed treaty. Here we find a case cognizable and enforcible by the courts, *because* the rights are fixed not by a treaty promise but by Federal municipal law, to which and which alone the courts can look for all the law in the case *necessary to sustain the action and admeasure judgment.*

The issue is in the case, What effect does subsection J have upon the Cuban treaty? Apparently none. Subsection B carefully recited that nothing in *this act* shall affect the Cuban treaty *or* the provisions of the act of Congress heretofore possessed for the execution of the same. Subsection 7 is "in this act," and by subsection B it is provided that nothing "in this act" shall "affect" the provisions of the act of 1903, which automatically fixes the relative rates of duty to be charged upon Cuban importations under all American tariff acts, present and future. Subsection B expressly excludes subsection 7 from any effect upon the Cuban treaty and the act of 1913 executing that treaty.

The necessity for subsection B in the act of 1913 and its parallel predecessor, section 3, in the act of 1909, are convincing that the Congress believed what seems obvious, that the enactment of the dutiable schedules of those acts without such a saving section would repeal the act of 1903 and violate the Cuban treaty promise.

In that situation, if it were sufficient to execute that treaty promise and restore it to the previously executed status enforcible in the court enjoyed under the act of 1903, to provide only that nothing therein "shall be construed to abrogate or in any measure impair or affect the treaties," why did Congress, in section 3, act of 1909, and subsection B, act of 1913, *after using that language*, proceed further and expressly save the act of 1903, executing the Cuban treaty? And if that language is sufficient to execute all these treaty articles, why did Congress go further in both these tariff acts of 1909 and 1913 as

to the Cuban treaty to indulge the surplusage legislation of preserving the executing act of 1903?

For these reasons I am constrained to the opinion that Congress did not intend subsection 7 to be presently effective; and, that if so, the treaty provisions herein invoked are executory and neither self-executing nor executed by said subsection.

Finally, courts in construing an act must always seek out the intent of Congress and give effect thereto. The very words of this act and every particle of the history of this enactment demonstrate the Congressional purpose to *discriminate* in favor of *American* ships.

While it is true, as shown by the majority opinion, that owing to the great number of uncertain and indeterminable factors, it is impossible to accurately estimate the relative amount of tonnage carried in American as compared with foreign treaty vessels that would receive the benefits of this law, as construed by the majority opinion, there is sufficient of certain factors to disclose that at least twelve times more benefits would accrue to foreign than to American ships, and that really all the great maritime nations of the world would share therein equally with our merchant marine. Where, then, under this interpretation, is the advantage or benefit or *favor* to American vessels? *How can it be said we discriminate in favor of American shipping when we give the same favor to all its important and effective competitors?*

If we consult current history and the report of the Ways and Means Committee herein, the present tariff act was constructed upon narrow lines of revenue without more incidental protection than deemed necessary to equalize the difference in cost of production and delivery. On the figures of the majority opinion this ruling reduces the duties 5 per cent upon at least more than one-half of our dutiable imports. Did Congress intend after all its labored adjustment of rates, in accordance with the stated principles, by this single paragraph to menace, if not destroy, the effect of all preceding carefully adjusted schedules?

It appears from the majority opinion that there are at least 5,500 treaty-nation vessels in the American foreign trade. It is certain that there are not over 50 American vessels. Did Congress, in order to benefit these 50 vessels and such as might in the course of years—necessarily few under this interpretation—register under our flag immediately give an equal bounty to 5,500 other vessels? If so, where was the "favor" to "our ships"?

The fact that during the enactment of this provision Congress changed its terms from American "built" vessels to vessels of American "registry" showed a desire to induce foreign ships to take advantage of the American registry. Is that intention sub-

served by extending this subsection alike to the foreign vessels of all the great shipbuilding nations of the world?

Placing such a construction upon this act not only does violence to the rule of construction prescribed in the proviso but to numerous well-settled, long-established rules of interpretation.

Thus in Hill *v.* American Surety Co. (200 U. S., 197, 203) the Supreme Court said:

> Statutes are not to be so literally construed as to defeat the purpose of the legislature. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." (United States *v.* Freeman, 3 How., 556.) "The spirit as well as the letter of a statute must be respected; and where the whole context of a law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent." (Chief Justice Marshall in Durousseau *v.* United States, 6 Cranch, 307.) United States *v.* St. Anthony Railroad Company (192 U. S., 524).

In United States *v.* Kirby (7 Wall., 74 U. S., 482, 486) an equally applicable rule was exercised:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

Jacobson *v.* Massachusetts (197 U. S., 11, 39); Treat *v.* White (181 U. S., 264, 267).

And, in Lau Ow Bew *v.* United States (144 U. S., 47, 59), that court said:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid unjust or an absurd conclusion. (Church of the Holy Trinity *v.* United States, 92 U. S., 259; United States *v.* Kirby, 7 Wall., 482; Oates *v.* National Bank, 100 U. S., 239.)

The additional intent being manifested in the provision, however, that this purpose of Congress should not be put into force and effect so long as our treaty obligations stand in the way, I am of the opinion that the statute should be so construed as "will effectuate the legislative intention" when and as soon as possible.

If the gist of these views may be accented in conclusion, it is that the statute in question is an existing law of the land effective *in futuro;* that the treaty articles in question are constitutional and even *ratified* promises addressed to and to be regarded, disregarded, performed, or parleyed by the political branches of the Government and not enforced as complete municipal laws of the land.

For these reasons, it would seem that the protests of the importers herein are without judicial cognizance and should be dismissed.

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136 United States Court of Customs Appeals.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,
vs.
The United States, appellee. } No. 1353.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,
vs.
The United States, appellee. } No. 1355.

The United States, appellant,
vs.
J. Wile Sons & Co., appellee. } No. 1391.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeals as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[seal.] Arthur B. Shelton, *Clerk.*

137 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which R. B. Henry Company et al. are appellants and The United States is appellee, No. 1353, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and
138 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[seal.] James D. Maher,
Clerk of the Supreme Court of the United States.

139 (Indorsed:) File No. 24778. Supreme Court of the United States, No. 1034, October term, 1914. The United States vs. R. B. Henry Company et al. Writ of certiorari.

140 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
R. B. HENRY COMPANY ET AL. } No. 1034.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
ALBERT H. WASHBURN,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

141 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of R. B. Henry Co. et al v. The United States, No. 1353, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-six day of June, A. D. 1915.

[SEAL.]
ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received June 29, 1915.

142 (Indorsed:) File No. 24778. Supreme Court U. S., October term, 1915. Term No. 497. The United States, petitioner, vs. R. B. Henry Company et al. Writ of certiorari and return. Filed June 29, 1915.

143 United States of America, ss.

The President of the United States of America to the honorable judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which James Elliott & Company et al. are appellants, and The United

States is appellee, No. 1355, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals
144 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

145 (Indorsed:) File No. 24779. Supreme Court of the United States, No. 1035, October term, 1914. The United States vs. James Elliott & Company et al. Writ of certiorari.

146 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
JAMES ELLIOTT & COMPANY ET AL. } No. 1035.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
ALBERT H. WASHBURN,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

147 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in purusance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of J. Elliott & Co. et al. v. The United States, No.

1355, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk, Supreme Court U. S. Received June 29, 1915.

148 (Indorsed:) File No. 24779. Supreme Court U. S., October term, 1915. Term No. 498. The United States, petitioner, vs. James Elliott & Company et al. Writ of certiorari and return. Filed June 29, 1915.

149 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and J. Wile Sons & Company are appellees, No. 1391, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and
150 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

151 (Indorsed:) File No. 24780. Supreme Court of the United States, No. 1036, October term, 1914. The United States vs. J. Wile Sons & Company. Writ of certiorari.

152 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
J. WILE SONS & COMPANY. } No. 1036.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified copy of the transcript of the record

on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
ALBERT H. WASHBURN,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

153 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. J. Wile, Sons & Co., No. 1391, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk, Supreme Court U. S. Received June 29, 1915.

(Indorsed:) File No. 24780. Supreme Court U. S., October term, 1915. Term No. 499. The United States, petitioner, vs. J. Wile Sons & Company. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24778. U. S. Court of Customs Appeals. Term No. 497. The United States, petitioner, vs. R. B. Henry Company et al. File No. 24779. Term No 498. The United States, petitioner, vs. James Elliott & Company et al. File No. 24780. Term No. 499. The United States, petitioner, vs. J. Wile Sons & Company. Petition for writs of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File Nos. 24778, 24779, and 24780.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 500.

THE UNITED STATES, PETITIONER,

vs.

ROBERT MULLER & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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1364

United States Court of Customs Appeals.

ROBERT MULLER & CO., APPELLANTS,
vs. No. 1364.
THE UNITED STATES, APPELLEE.

Transcript of record on appeal from the Board of United States General Appraisers.

WALDEN & WEBSTER, *Attorneys for Appellants.*

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed Apr. 20, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
(Stamped:) Office of the clerk Supreme Court U. S. Received June 12, 1915.

1

Petition.

United States Court of Customs Appeals.

ROBERT MULLER & CO., APPELLANTS,
v. No. 1364.
THE UNITED STATES, APPELLEE.

To the honorable the United States Court of Customs Appeals:

Your petitioners pray that you review the questions of law and fact involved in the decision of the Board of United States General Appraisers heretofore made in each of the matters referred to in the annexed Schedule A, which is made a part hereof, as to the amount of duty assessed upon said merchandise.

The particulars of the errors of law and fact involved in said decision of the said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, March 31, 1914.

ROBERT MULLER & CO.,
Petitioners.
By WALDEN & WEBSTER,
Attorneys, 29 Broadway, New York City.

Schedule A.

Protest Nos. 729239/35913. Importers, Robt. Muller & Co. Entry No. 284362. Vessel, "Rotterdam." Entered 10/14/13. Decided by the Board of U. S. General Appraisers on or about the 6th day of March, 1914.

Schedule B.

The Board of United States General Appraisers has confirmed the action of the collector of the port in assessing and exacting duty on

merchandise imported in a vessel of the Netherlands under the act of October 3, 1913, thereby making errors of law and fact by failing to find, or finding the contrary of the following propositions:

2 I. That the merchandise was imported in a vessel of the Netherlands after the passage of the tariff act of October 3, 1913.

II. That duty was assessed thereon at 45% ad valorem under par. 316 of said act without any discount or deduction.

III. That a discount of 5 per centum should be allowed on said duties in accordance with Section IV, Par. J, subsection 7 of said act, and the proviso thereto, and the treaty between the United States and His Majesty the King of the Netherlands concluded August 26, 1852, ratifications exchanged Feb. 25, 1853; proclaimed by the President Feb. 26, 1853, particularly Article I of said treaty (10 Stat. at L., 982).

IV. That the protest should be sustained and the decision of the collector reversed.

Endorsed: United States Court of Customs Appeals. Filed Apr. 1, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued April 1, 1914.

ARTHUR B. SHELTON, *Clerk.*

Bond.

Bond of Henry J. Webster, in the sum of fifty dollars, approved by James F. Smith, associate judge. Filed April 1, 1914.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss.

Robert Muller & Co., appellant, vs. The United States, appellee. Board's protest No. 729239, collector's No. 35913, suit No. 1364.

3 The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the question of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court having by order dated the first day of April, 1914, required the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and the decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified

statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question, with the report of the collector of customs thereon;

2. The stipulation upon which the protest was submitted;

3. A copy of the board's decision in question, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this tenth day of April, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount—Netherlands.

Protest 729239/35913.

NEW YORK, 12/19/13.

COLLECTOR OF CUSTOMS.

SIR: Protest is hereby made against your decision assessing duty on merchandise covered by entry or entries below named. The reasons for objection, under the tariff act of October 3rd, 1913, are that a discount of 5% of the duties should be allowed on such of the merchandise as was imported in vessels registered under the laws of the United States, in accordance with sec. IV, par. J, subsec. 7,
4 and that the same discount should be allowed on such of the merchandise as was imported in vessels of foreign register, in accordance with the proviso of said subsection and the treaty between the United States and the country to which said vessel belongs. As to such of the merchandise as remained in bond after October 3rd, 1913, note sec. III, par. S, and sec. IV, par. Q.

Entry No. 284362. Vessel, Rotterdam. Entered, 10/14/13. Bond No. 80455. Liquidated, 11/19/13. Marks and Nos., all.

ROBERT MULLER & CO.,
By WALDEN & WEBSTER,
Attorneys, 29 Broadway, New York City.

Endorsed: Custom house, New York. Received Dec. 19, 1913.

Report of the collector.

JAN. 21, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or

deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

Before Board No. 3. United States General Appraisers.

In re protest of Robt. Muller & Co., on 5% discount. Pro. Nos. 729239/35913.

It is hereby stipulated and agreed that the merchandise referred to in the above-entitled protest was imported in a vessel of the Netherlands, and that said protest may be and is hereby submitted without being placed upon a regular docket. It is also agreed that the importer may have three days from the date hereof for filing brief, and that the Assistant Attorney General may have ten days after the filing of the importer's brief in which to file brief on behalf of the Government.

Dated New York, Jan. 28, 1914.

WALDEN & WEBSTER,
Attys. for Importer.
WM. L. WEMPLE,
Asst. Atty. General, Atty. for the United States.

Endorsed: U. S. Gen. Apprs. Received Jan. 28, 1914.

Decision of the board.

(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469 and 729239, etc., of J. Elliott & Co., and Robert Muller & Co. et al., against the assessment of duty by the collector of customs at the port of New York. Before Board 3 (Waite, Somerville, and Hay, General Appraisers).

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said

subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded be-
6 tween the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the Untied States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

"The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that
7 subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced

would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision
8 in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide
9 for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37), the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty

upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can
11 it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must
12 go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the court

upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the Wood-Pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other
18 or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. I, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so

far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (Wood-Pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the
14 articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself
15 without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratifi

cation. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force, and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and
16 the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary,

which has no suitable means to exercise them, but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the im-
17 portation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the question as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution and the laws of the United States which
18 shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior

to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either
19 a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within

the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a
20 part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This ques-
21 tion has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as the House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

22 We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule

the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of Ameri-
23 can registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty, it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913, and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727692, 728560, and 729239; Norway, protest 727894; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

24 We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727894, 727895, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

Endorsed: United States Court of Customs Appeals. Filed April 11, 1914. Arthur B. Shelton, clerk.

25 United States Court of Customs Appeals.

ROBERT MULLER & Co., v. THE UNITED STATES. } No. 1364.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1364, Robert Muller & Co. *v.* The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

25½ United States Court of Customs Appeals.

ROBERT MULLER & Co., APPELLANT, *vs.* THE UNITED STATES, APPELLEE. } No. 1364.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

26 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fick, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

27 No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,

v.

William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,

v.

Park & Tilford, appellee.

in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importation the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

No. 1396.

The United States, appellant,
v.
Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,
v.
The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

28 United States Court of Customs Appeals.

ROBERT MULLER & Co., APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1364.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, vs. The United States, appellee, No. 1353.

29 United States Court of Customs Appeals.

ROBERT MULLER & Co., APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1364.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeals, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

30 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which Robert Muller & Company are appellants and The United States is appellee, No. 1364, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals

31 and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 24781. Supreme Court of the United States, No. 1037, October term, 1914. The United States vs. Robert Muller & Company. Writ of certiorari.

32 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
ROBERT MULLER & COMPANY. } No. 1037.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
HENRY J. WEBSTER,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

Return to writ.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Robert Muller & Co. v. The United States, No. 1364, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received Jun. 29, 1915.

34 (Indorsed:) File No. 24781. Supreme Court U. S., October term, 1915. Term No. 500. The United States vs. Robert Muller & Company. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24781. U. S. Court of Customs Appeals. Term No. 500. The United States, petitioner, vs. Robert Muller & Company. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24781.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 501.

THE UNITED STATES, PETITIONER,

vs.

WOOD & SELICK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

WOOD & SELICK ET AL., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1370.

Transcript of record on appeal from the Board of United States General Appraisers.

(Stamped: Filed May 7, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.)

(Stamped: Office of the clerk Supreme Court, U. S. Received June 12, 1915.)

Brooks & Brooks, attorneys for appellants.

Printed under the direction of the clerk.

1 Petition.

United States Court of Customs Appeals.

WOOD & SELICK, ET AL., PETITIONERS,
vs. 1370.
THE UNITED STATES.

To the honorable the United States Court of Customs Appeals:

Your petitioners, being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, which is hereby referred to and made a part hereof, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully pray your court to review the question involved therein and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact in said decisions of said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

WOOD & SELICK,
LOUIS MEYERS & SON,
Petitioners.

By BROOKS & BROOKS,
Attorneys, 12 Broadway, New York City.

Dated, New York, April 9, 1914.

Schedule A.

Protest No.	Importer.	Entry No.	Vessel.	Entered.
72860/35288	Wood & Selick	277924	Ryndam	Oct. 7/13
72675/34739	Louis Meyers & Son	255478	Kroonland	Sep. 16/13

Schedule B.

The Board of United States General Appraisers has confirmed the action of the collector of the port of New York in assessing and exacting duty on various merchandise imported into the United States and assessed with rates of duty prescribed by the schedules in paragraphs of the dutiable list of section I, of the tariff act of October 3, 1913, covered by protests numbered 727675/34739 and 728560/35258, thereby making the following errors of law and fact:

1. In not holding that, as a matter of law, under section IV, paragraph J, subsection 7, of the tariff act of October 3, 1913, a discount of 5 per centum on all duties imposed by said act must be allowed on all goods, wares, and merchandise imported in vessels admitted to registration under the laws of foreign nations or countries with which the United States has concluded treaties guaranteeing such goods, wares, and merchandise so imported against the imposition of other or higher duties or charges than is imposed on such goods, wares, and merchandise when imported in vessels of the United States.

2. In holding that the merchandise covered by protest 728560, imported in a vessel of the Netherlands, was not entitled to a discount of 5 per centum on the duties imposed on said merchandise by the tariff act of October 3, 1913.

3. In not holding that section IV, paragraph J, subsection 7, and Articles I and II of the treaty concluded August 26, 1852, between the United States and the Netherlands entitled the merchandise covered by protest 728560 to said discount of 5 per centum as claimed.

4. In holding that the enforcement of this statute (section IV, paragraph J, subsection 7, of the tariff act of October 3, 1913) did not compel a recognition of the right of treaty powers under the most-favored-nation clauses and most-favored-shipping clauses to the same concession or right extended to goods imported in vessels admitted to registration under the laws of the United States, and not holding to the contrary.

5. In holding that the nonallowance of said 5 per centum discount on the merchandise imported in vessels of the Netherlands, in connection with the allowance of said 5 per centum discount imported in vessels of the United States was not such a construction of said section IV, paragraph J, subsection 7, as to abrogate or in any manner impair or effect the provisions of any treaty concluded between the United States and any foreign nation.

6. In not holding that the nonallowance of said 5 per centum discount on the merchandise imported in vessels of the Netherlands, in connection with the allowance of said 5 per centum discount imported in vessels of the United States was such a construction of said Section IV, parapragh J, subsection 7, as did abrogate or in some

manner impair or effect the provisions of said treaty concluded between the United States and the Netherlands.

7. In holding that the applicable provisions of said treaty between the United States and the Netherlands were not self-executing but were executory, and that they were "merely contracts which address th'mselves to the ligeslative power"; and in not holding, on the contrary, that they were self-executing.

8. In holding that said applicable provisions of said treaty were not to be treated as the supreme law of the land, and that they were opposed to the spirit and letter of the Constitution, and in not holding to the contrary.

9. In holding that the question of the application of said treaty provisions was a political rather than a judicial one.

10. In holding that said treaty provisions, if deemed to be self-executing, would invade the functions of the House of Representatives in originating revenue bills, or the constitutional privileges of Congress to lay and collect duties.

11. In failing to hold that the proviso of said subsection 7 of paragraph J of Section IV gave force and effect to said treaty provisions as fully and to all intents and purposes as if they had been enacted laws, making them fully executed and enforc'able in the courts, and requiring judicial tribunals to construe the treaties
4 and statute together, and to avoid a construction which would deprive either of effect.

12. In holding that the benefit of said 5 per centum discount "was intended to be extended only to those ships which imported goods under the law of 1913."

13. In not holding that, as a matter of law, the merchandise covered by protest 727675, which was imported previously to October 3, 1913, without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent had been issued, and withdrawn from warehouse subsequently to October 3, 1913, should be treated for all duty purposes and subjected to the same duties and to no other or higher duties upon entry or withdrawal thereof and merchandise imported on or subsequently to October 3, 1913.

14. In overruling the protests and affirming the decisions of the collector.

15. In not sustaining the protests and in not reversing the decisions of the collector.

(Endorsed: United States Court of Customs Appeals. Filed Apr. 10, 1914. Arthur B. Shelton, clerk.)

Mandate.

Mandate issued April 10, 1914.

ARTHUR B. SHELTON, *Clerk.*

Bond.

Bond of C. Mahlon Kingman in the sum of twenty-five dollars, approved by R. M. Montgomery, presiding judge. Filed April 10, 1914.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss: Wood & Selick et al., appellants, vs. United
5 States, appellee. Board's Protest Nos. 728560, etc., Collector's No. 35258, etc., Suit No. 1370.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court having by order dated the —— day of ——, 191—, required the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protests 727675—34739 and protest 728560 with the reports of the collector of customs thereon;

2. The stipulations upon which the protests were submitted.

3. A copy of the decision of the board in question, G. A. 7540 (T. D. 34246).

Witness The Honorable Jerry B. Sullivan, president of the board, this 29th day of April, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount.

Protest 728560/35258.

NEW YORK, *Dec. 13, 191—.*

Please send notices relating to this protest to Brooks & Brooks, 12 Broadway, New York City.

SIR: Protest is made against your liquidation and assessment
6 of duty on entry for all merchandise, and other merchandise of the same character more particularly described on entry and invoices by marks and numbers, imported in the vessel named below. The reasons for objection to your action are that the goods are more aptly and specifically covered by the provisions mentioned herein than by those under which duty has been assessed. It is

claimed that the goods in question are dutiable or are exempt from duty under the tariff act of October 3, 1913, as follows:

The merchandise is entitled to a discount of 5 per cent on all duties assessed thereon perforce the provisions of subsection 7, paragraph J, of section 4, of said act, and the treaty between the United States and Netherlands, August 26, 1852.

The foregoing claims are made directly, or by virtue of the similitude clause in par. 386. It is further claimed that the goods are dutiable under par. 385 at 10% ad val., or if not so at 15% ad val.

Protest is also made against the payment of all duties not legally chargeable upon said importation, and payment of the amount exacted is made under duress and compulsion to obtain and retain peaceable possession of the goods, holding you and the Government responsible for its return.

Further information as to the details of the foregoing claims can be obtained from the invoices and entries or will be furnished to the collector and to the General Appraisers, if needed by them or by either of them, on application to the undersigned: the marks and numbers noted herein and the endorsements hereon, are given without prejudice and simply for your convenience.

WOOD & SELICK,
By BROOKS & BROOKS, *Attorneys.*

To the COLLECTOR OF CUSTOMS.

Entry No. 277924. Bond No. 79898. Vessel, Ryndam. Date of Entry, Oct. 7/13. Date of liquidation, Nov. 14/13.

Endorsed: Customhouse, New York. Received Dec. 13, 1913.

7 Report of the collector.

JAN. 14, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Protest 727675/34739.

NEW YORK, *Dec. 6, 191—.*

Please send notices relating to this protest to Brooks & Brooks, 12 Broadway, New York City.

SIR: Protest is made against your liquidation and assessment of duty on entry for All merchandise, assessed under act of 1913, and other merchandise of the same character, more particularly described

on entry and invoices by marks and numbers imported in the vessel named below. The reasons for objection to your action are that the goods are more aptly and specifically covered by the provisions mentioned herein than by those under which duty has been assessed. It is claimed that the goods in question are dutiable or are exempt from duty under the tariff act of October 3, 1913, as follows:

The merchandise is entitled to a discount of 5 per cent on all duties assessed thereon perforce the provisions of subsection 7, paragraph J, of section 4 of said act, and the treaty between the United States and Belgium, March 8, 1875.

Protest is also made against the payment of all duties not
8 legally chargeable upon said importation, and payment of the amount exacted is made under duress and compulsion to obtain and retain peaceable possession of the goods, holding you and the Government responsible for its return.

Further information as to the details of the foregoing claims can be obtained from the invoices and entries or will be furnished to the collector and to the general appraisers, if needed by them or by either of them, on application to the undersigned. The marks and numbers noted herein and the endorsements hereon are given without prejudice and simply for your convenience.

LOUIS MEYERS & SON,
By BROOKS & BROOKS, *Attorneys.*

To the COLLECTOR OF CUSTOMS.

Entry No. 255478. Bond No. 75029. Vessel, Kroonland. Date of entry, Sept. 16/13. Date of liquidation, Dec. 3/13.
(Endorsed): Customhouse, New York. Received Dec. 6, 1913.)

Report of the collector.

JAN. 6, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

United States General Appraisers. Board No. III. In the matter of protest 728560/35258 of Wood & Selick.

9 It is stipulated and agreed that the merchandise covered by the above-entitled protest was manufactured or produced in the Netherlands, and was exported from Rotterdam to the United

States in the steamer Ryndam, which steamship flies the flag of and is registered under the laws of the Netherlands.

The protest is submitted for decision.

BROOKS & BROOKS,
Attorneys for the Importers.
WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.

Dated NEW YORK, *January 12, 1914.*
(Endorsed: U. S. Gen. Apprs. Received Jan. 21, 1914.)

Stipulation.

United States General Appraisers. Board No. III. In the matter of protest 727675/34739 of Louis Meyers & Son.

It is stipulated and agreed that the merchandise covered by the above-entitled protest was exported from Antwerp, Belgium, to the United States in the steamship Kroonland, and that said steamship Kroonland was admitted to registration under the laws of the United States at the time of and prior to the voyage in question. The protest is submitted for decision.

BROOKS & BROOKS,
Attorneys for the Importers.
WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.

Dated, NEW YORK, *January 19, 1914.*
(Endorsed: U. S. Gen. Apprs. Received Jan. 21, 1914.)

Decision of the Board.

(T. D. 34246—G. A. 7540.)

UNITED STATES GENERAL APPRAISERS,
New York, March 6, 1914.

10 In the matter of protests 726469, 727675, 728560, etc., of J. Elliott & Co., Louis Meyers & Son, Hood & Selick, et al., against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States

in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

"The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States
11 and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, amandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We cannot concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject

12 matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting

13 party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

14 The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

15 The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of

the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty or impairs it in any manner? We think not. It rather tends to enlarge the scope of it and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty
16 powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilige is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation

clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

17 "Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agree-
18 ments between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the

decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal that that assumed by the Court of Customs Appeals.

We are of the opinion that these treaties are not self-executing.

19 In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of rati-

fication. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

20 Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the *specific* provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can scarcely be too easily awakened or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"It is a judicial question whether a treaty with a foreign

21 sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of

such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are
22 enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent

judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of
23 Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the
24 Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within

the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

25 "The powers to regulate commerce and to levy duties are as expressly given as the power to declare war, and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R.
26 Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445, et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and
27 the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal
28 thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727894; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727894, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

(Endorsed: United States Court of Customs Appeals. Filed Apr. 30, 1914. Arthur B. Shelton, clerk.)

29 United States Court of Customs Appeals.

WOOD & SELICK ET AL.
vs.
THE UNITED STATES. } No. 1370.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1370, Wood & Selick et al. v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, Clerk.

30 United States Court of Customs Appeals.

WOOD & SELICK, LOUIS MEYER & SON, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1370.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

31 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had it is ordered:

(1) That the merchandise involved in these cases, importe

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fick, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

32 The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,

v.

William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,

v.

Park & Tilford, appellee.

in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importation the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

No. 1396.

The United States, appellant,
v.
Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,
v.
The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

33 United States Court of Customs Appeals.

WOOD & SELICK, LOUIS MEYER & SON, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1370.

For the opinion of the court in the above entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

34 United States Court of Customs Appeals.

WOOD & SELICK, LOUIS MEYER & SON, APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1370.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said

court in the above entitled appeals, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915..

[SEAL.] ARTHUR B. SHELTON,
Clerk.

35 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which Wood & Selick et al. are appellants and The United States is appellee, No. 1870, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed
36 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

38 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
WOOD & SELICK ET AL. } No. 1038.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO W. DAVIS,
Solicitor General.
FREDERICK W. BROOKS,
Counsel for Respondents.

JUNE 26, 1915.

Filed June 26, 1915, United States Court of Customs Appeals.
ARTHUR B. SHELTON, *Clerk.*

39 Return to writ.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Wood & Selicck et al. v. The United States, No. 1370, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamp:) Office of the clerk, Supreme Court, U. S. Received June 29, 1915.

(File No. 24,782. Supreme Court, U. S. October term, 1915. Term No. 501. The United States, petitioner, vs. Wood & Selick et al. Writ of certiorari and return. Filed June 29, 1915.)

(Indorsement on cover:) File No. 24,782, U. S. Court of Customs Appeals. Term No. 501. The United States, petitioner, vs. Wood & Selick et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,782.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 502.

THE UNITED STATES, PETITIONER,

vs.

E. LA MONTAGNE'S SONS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

No. 1399.

(Stamped: Office of the clerk, received June 12, 1915, Supreme Court, U. S.)

E. La Montagne's Sons, appellants, *vs.* The United States, appellee.

Transcript of record.

On appeal from the Board of United States General Appraisers.

(Stamped: Filed June 4, 1914, United States Court of Customs Appeals, Arthur B. Shelton, clerk.)

B. A. LEVETT,
Attorney for Appellants.

(Printed under the direction of the clerk.)

1 Petition.

U. S. Court of Customs Appeals. E. La Montagne's Sons, appellants, *vs.* The United States, appellee. Suit No. 1399.

To the Honorable the United States Court of Customs Appeals:

Your petitioners pray that the said Court of Customs Appeals review the questions of law and fact involved in the decision of the Board of U. S. General Appraisers made on the 16th day of March, 1914, as to the amount of duties assessed upon certain merchandise imported by them at the port of New York on the 6th day of October, 1913, per S. S. Minnehaha entry #276299, covered by protest number 729315/36044 and for that purpose your petitioners pray that an order be entered requiring the said Board of U. S. General Appraisers to return to this court the record and evidence taken by them, together with a certified statement of the facts involved in said matter and their decision thereon.

The particulars of the errors of law and fact involved in said decision of said Board of U. S. General Appraisers of which your petitioners complain are set forth in the following statement of errors:

1. In holding that the importer herein was not entitled to a discount of 5 per cent on the duty paid on the merchandise imported herein by virtue of paragraph J, Section IV, subsection 7, of the tariff act of October 3, 1913.

2. In not holding that the importer herein was entitled to a discount of 5 per centum on the duty paid on the merchandise imported herein by virtue of paragraph J, Section IV, subsection 7, and the treaty entered into between the United States of America and the Kingdom of Great Britain, dated July 3, 1815.

3. In holding that the favored-nation clause contained in the treaty entered into between the United States and the King-
2 dom of Great Brithin, dated July 3, 1815, is not brought into question by the allowance of a discount granted under paragraph J, Section IV, subsection 7 of the tariff act of October 3, 1913, to merchandise imported in American vessels.

4. In holding that the provisions contained in the treaty above mentioned by which each of the contracting parties thereto agrees not to levy higher duties upon the importations in vessels of the other country than if the same had been imported in vessels of its own country are not self-executing, and therefore not within the jurisdiction of the courts.

5. In holding that said provisions are opposed to the letter and spirit of the Constitution of the United States.

6. In holding that the provisions contained in said treaty in reference to duties upon merchandise are in contravention to the provisions contained in the Constitution of the United States, especially section 8, Subsection I.

7. In holding that the provisions contained in said treaty infringe upon and restrict the right of Congress to raise revenue.

8. In holding that the provisions contained in said treaty in reference to the payment of duty upon merchandise are in conflict with and violate the Constitution of the United States, which provides that all bills for raising revenue shall originate in the House of Representatives.

9. In overruling the protests herein.

10. In not sustaining the protests herein.

Dated New York, May 2, 1914.

E. LA MONTAGNE'S SONS,
Appellants.

By B. A. LEVEIT,
Attorney for Appellants, 17 State Street, New York City.

(Endorsed: United States Court of Customs Appeals. Filed May 11, 1914. Arthur B. Shelton, clerk.)

Mandate.

Mandate issued May 11, 1914. Arthur B. Shelton, clerk.

3 ## Bond.

Bond of Joseph W. Masters in the sum of fifty dollars, approved by R. M. Montgomery, presiding judge. Filed May 11, 1914.

Return of the board.

UNITED STATES OF AMERICA,
Board of United States General Appraisers, New York, ss:

E. La. Montagne's Sons, appellants, vs. The United States, appellee. Board's protest No. 729315. Collector's No. 36044. Suit No. 1399.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court having by order, dated the 11th day of May, 1914, required the board to transmit to said court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question with the report of the collector of customs thereon;
2. Stipulation of counsel upon which the protest was submitted;
3. A copy of the board's decision in question abstract 35154 (T. D. 34307).

Witness the Honorable Jerry B. Sullivan, president of the board, this 25th day of May, A. D. 1914.

[SEAL.] O. D. MADGE, *Chief Clerk.*

(G. V. O. Five per cent discount—English vessels.)

4 Protest 729315/36044.

NEW YORK, *December 19, 1913.*

Please send all notices relating to this protest to Masters & Levett, 17 State Street, New York City.

Hon. Collector of Customs, Port of New York.

SIR: We hereby protest against your liquidation and assessment of duty on all merchandise imported by us in the vessel and on the date named below, and covered by the entry below numbered, on the ground that in making such assessment you have illegally and in violation of the law refused or neglected to allow a discount of five per cent of the duties.

We claim that in the liquidation and assessment of duties on such merchandise a discount of five per cent of the duty should be allowed under and by virtue of paragraph J, section IV, subsection 7 of the act of October 3, 1913, and the terms of the treaty or treaties concluded between the United States and the nation or country from which such merchandise was exported, or under the laws of which

the vessel in which such merchandise was imported was registered. We particularly claim such discount of five per cent of the duties by virtue of said paragraph J, section IV, subsection 7 of said act, and the treaty entered into between the United States and the Kingdom of Great Britain dated July 3, 1815, and proclaimed December 22, 1815, especially under article 2 of said treaty.

We also protest against the payment of all duties not legally chargeable upon said importations, and pay the amount exacted under duress and compulsion to obtain and retain peaceable possession of the goods, holding you and the Government responsible for its return.

E. LA MONTAGNE'S SONS,
By MASTERS & LEVETT,
Attorneys.

Entry No. 276299. Bond No. 79680. Vessel, Minnehaha. Date of entry, Oct. 6/13. Date of liquidation, Nov. 20/13. Marks and Nos. — and others as per invoice and entry.

5 (Endorsed: Customhouse, New York. Received Dec. 19, 1913.)

Report of the collector.

JAN. 21, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the stautory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

Before Board No. 3. U. S. General Appraisers. In the matter of protest 729315 of E. La Montagne's Sons, on discount of duty.

It is hereby stipulated and agreed that the merchandise covered by this protest consists of gin, the product of England, which was regularly imported into the United States in the S. S. "Minnehaha," and that said steamer is of English registry; and that the facts appearing in other stipulations on this subject, now before the board, may be considered as in this stipulation, so far as they are relevant.

The protest is submitted on this stipulation.

WM. L. WEMPLE,
Asst. Attorney General, Attorney for the U. S.
MASTERS & LEVETT,
Attorneys for the Importers, 17 State Street, New York City.

Dated NEW YORK, *March 11th, 1914.*

(Endorsed: U. S. Gen. Apprs. Received March 11, 1914.)

6 Decision of the board.

BOARD OF UNITED STATES GENERAL APPRAISERS,
New York, March 16, 1914.

In the matter of protest 729315/36044 of E. La Montagne's Sons against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, *General Appraiser:* This protest has been submitted upon stipulation between counsel for the Government and counsel for the importers to the effect that the merchandise consists of gin, the product of England, which was regularly imported into the United States in the S. S. "Minnehaha," and that said steamer is of English registry. The claim in the protest is that in the assessment of duty upon these goods a discount of 5 per cent should be allowed by virtue of paragraph J, Section IV, subsection 7 of the act of October 3, 1913, and the treaty between the United States and Great Britain.

The protest is overruled on authority of G. A. 7540 (T. D. 34246).

BYRON S. WAITE,
H. M. SOMERVILLE,
Board of U. S. General Appraisers.

(Endorsed: United States Court of Customs Appeals. Filed May 26, 1914. Arthur B. Shelton, clerk.)

7 United States Court of Customs Appeals.

E. LA MONTAGNE'S SONS
v.
THE UNITED STATES. } No. 1399.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1399, E. La Montague's Sons v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

8 United States Court of Customs Appeals.

E. LA MONTAGNE'S SONS, APPELLANT,
vs.
THE UNITED STATES, APPELLEE.
No. 1399.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

United States Court of Customs Appeals.

Tuesday, May 25, 1915.

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,
v.
The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,
v.
The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,
v.
The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered—

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

No. 1392.

The United States, appellant,

v.

G. W. Faber, Inc., appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,

v.

William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,

v.

Park & Tilford, appellee.

No. 1396.

The United States, appellant,

v.

Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,

v.

The United States, appellee.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importations the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig, Inc., A. J. Dale, appellants,
v.
The United States, appellee.

* * * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

11 United States Court of Customs Appeals.

E. LA MONTAGNE'S SONS, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1399.

For the opinion of the court in the above entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

12 United States Court of Customs Appeals.

E. LA MONTAGNE'S SONS, APPELLANT,
vs.
THE UNITED STATES, APPELLEE. } No. 1399.

I, Arthur B. Shelton, Clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court, this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk.

13 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the honorable the judges of the United States Court of Customs Appeals, greeting:

[SEAL.]

Being informed that there is now pending before you a suit in which E. La Montagne's Sons are appellants and the United States

is appellee, No. 1399, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceeding therein should be certified by the said Court of Customs Appeals and removed
14 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

15 File No. 24,783. Supreme Court of the United States, No. 1039, October Term, 1914. The United States *vs.* E. La Montagne's Sons. Writ of certiorari.

16 In the Supreme Court of the United States.

October term, 1914.

THE UNITED STATES, PETITIONER,
v.
E. LA MONTAGNE'S SONS. } No. 1039.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
B. A. LEVETT,
Counsel for Respondents.

JUNE 25, 1915.

Field June 25, 1915. United States Court of Customs Appeals, Arthur B. Shelton, clerk.

17 Return to writ.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the

transcript of record furnished with the application for a writ of certiorari in the case of E. La Montagne's Sons v. The United States, No. 1399, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped: Office of the clerk Supreme Court U. S. Received June 29, 1915.)

18 File No. 24,783. Supreme Court U. S. October term, 1915. Term No. 502. The United States, petitioner, vs. E. La. Montagne's Sons. Writ of certiorari and return. Filed June 29, 1915.

19 File No. 24,783. U. S. Court of Customs Appeals. Term No. 502. The United States, petitioner, vs. E. La Montagne's Sons. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,783.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 503.

THE UNITED STATES, PETITIONER,

vs.

ALBERT LORSCH & COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a 1440

United States Court of Customs Appeals.

ALBERT LORSCH & CO. ET AL., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1440.

Transcript of record on appeal from the Board of United States General Appraisers.

McLaughlin, Russell, Coe & Sprague, attorneys for appellants.
Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.

1 *Petition.*

United States Court of Customs Appeals.

ALBERT LORSCH & CO. ET AL., APPELLANTS,
vs.
UNITED STATES OF AMERICA, APPELLEE. } No. 1440.

To the honorable the United States Court of Customs Appeals:

Your petitioners, Albert Lorsch & Co. et al., being dissatisfied with the decisions made on August 7, 1914, by the Board of United States General Appraisers as to the construction of the law and facts respecting the allowance of a discount of five per centum upon the duties paid upon the merchandise imported at the port of New York by the said Albert Lorsch & Co. et al., and covered by the following protests and entries:

Protest.	Importer.	Entry.
728626	A. Lorsch & Co.	275539
733435	Henry Glass & Co.	315953
736757	F. L. Kraemer & Co.	282144
740000	L. D. Bloch & Co.	303963
740315	A. Leipzig, Inc.	293803
740649	A. J. Dale	290730

respectfully make application to this court for a review of the questions of law and fact involved in such decisions and set forth the following statement of errors of law and facts complained of:

Errors of law.

The Board of U. S. General Appraisers erred—

1. In overruling appellants' protests.
2. In not sustaining appellants' protests.
3. In following the board's decision in G. A. 7540—T. D. 34246.
4. In not holding that the merchandise covered by each of appellants' protest is entitled to a discount of 5% on the duties imposed by virtue of treaties between the United States and the countries under whose laws the vessels named in said protests are registered.

2

5. In not holding that the merchandise covered by each of appellants' protests is entitled to a discount of 5% on the duties imposed by virtue of Section IV, paragraph J, subsection 7 of the tariff act of 1913.

6. In not holding that the refusal to allow said discount of 5% is contrary to the terms of treaties between the United States and the following countries: France, Germany, Japan, Austro-Hungary, Italy, and Great Britain.

7. In not holding that the refusal to allow said discount of 5% is contrary to the provisions of paragraph J, subsection 7 of the tariff act of 1913.

8. In not holding that no other or higher duties can legally be levied on the merchandise covered by this appeal than are provided in the schedules of the tariff act in conjunction with Section IV, paragraph J, subsection 7 of said act, in the case of similar merchandise imported on vessels admitted to registration under the laws of the United States.

9. In not directing the collector of the port to refund to appellants 5% of the duties exacted on the merchandise covered by this appeal.

Errors of fact.

The Board of U. S. General Appraisers erred—

1. In not holding that the collector of the port of New York assessed other or higher duties or charges levied in the name of and to the profit of the United States Government on the merchandise imported in the vessels named in the protests and registered under the laws of the countries named in said protests than is provided for by the schedules of the United States tariff act of 1913 and Section IV, paragraph J, subsection 7 of said act, in the case of similar merchandise imported in vessels of the United States.

2. In not holding that said excess amounts to 5% of the duties exacted.

3 Accordingly, your petitioner respectfully prays that this court order the said Board of United States General Appraisers to return to this court the record and evidence taken by the said board, together with a certified statement of the facts involved in the case and their decision thereon, and thereupon to review said decision and to hear and determine the questions of law and fact involved in the same.

A. Lorsch & Co.,
Henry Glass & Co.,
F. L. Kraemer & Co.,
L. D. Bloch & Co.,
A. Leipzig (Inc.),
A. J. Dale,
By McLaughlin, Russell, Coe & Sprague,
165 Broadway, New York City.

Dated August 21, 1914.

Endorsed: United States Court of Customs Appeals. Filed Aug. 24, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued August 24, 1914.

ARTHUR B. SHELTON, *Clerk.*

Bond.

Bond of Sidney Mandell, in the sum of twenty-five dollars, approved by O. M. Barber, associate judge. Filed Aug. 24, 1914.

Return of the board.

Board of United States General Appraisers.

ALBERT LORSCH & CO. ET AL., APPELLANTS,
v.
THE UNITED STATES, APPELLEE. } No. 1440.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court having
4 ordered the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:

1. Protest 728676/35109 with the report of the collector of customs thereon;

2. The other protests covered by the petition, with the reports thereon, enclosed herewith in a separate envelope;

3. The stipulation upon which the protests were submitted;

4. A copy of the board's decision in question, Abstract 36281 (T. D. 34704).

Witness the Honorable Jerry B. Sullivan, president of the board, this eighth day of September, A. D. 1914.

[SEAL.]

O. D. MADGE, *Chief Clerk.*
G. V. O.

Five per cent discount.

Protest 728676/35109.

NEW YORK, *Dec. 10, 1913.*

Hon. COLLECTOR OF CUSTOMS,
Port of New York.

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against, your ascertainment and liquidation of duties, and your decision assessing duty under the tariff act of October 3,

1913, on the merchandise covered by the entries below named. Said merchandise is not dutiable as assessed. In respect to each of said entries we claim as follows: That the duties assessed on said merchandise are subject to a discount of 5% for the reason specified below.

We hereby give notice that this protest is intended to apply to all of the merchandise, articles and payments included in or
5 incident to the importations herein specified. The above claims are made under or by virtue of the tariff act of Oct. 3, 1913.

We further claim, under section 4, paragraph J, subsection 7 of the tariff act of 1913, a discount of 5% on all duties imposed by this act upon all merchandise covered by the entries herein specified, imported in vessels admitted to registration under the laws of the United States or imported in vessels as specified below, by virtue of treaties as specified below, or any subsequent treaty terminating or modifying any of said treaties.

We claim further that the duty on each and every item of merchandise covered by said entries is entitled to said 5% discount, both by virtue of said section 4, paragraph J, subsection 7, and by virtue of a treaty or treaties made between the United States and the country of exportation, or between the United States and the country where part or all of said merchandise was produced, or between the United States and the country under whose flag the vessel conveying said merchandise sails, or by either said section or said treaty or treaties.

We claim further that the duty on each and every item of merchandise covered by the entries herein specified is entitled to said discount of 5% by virtue of the fact that a discount of 5% is allowed or has been granted in the case of merchandise imported in a vessel of the registration of the United States, or has been allowed in the case of merchandise the growth, production, or exportation of other countries or shipped in the vessels of other countries.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and the demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the claims is hereby made.

The marks and numbers below enumerated are subject to errors of omissions or otherwise and are given without prejudice.

6 Entry No. 275539. Date of entry, 10/6/13. Liquidated, 11/11/13. Vessel, LaLorraine. How registered, French. Treaty, France, 1778, 1800, 1822, 1898, 1902, 1908, and other treaties, etc., specified below. Marks and number, A. L. Co. 3446 and various as per invoices and entries.

Treaties.

Algiers, 1815, 1816; Argentine Republic, 1853; Austria-Hungary, 1829; Belgium, 1845, 1858, 1863, 1875; Bolivia, 1858; Borneo, 1850; Brazil, 1828; Bulgaria, 1906; Chile, 1832, 1833; China, 1844, 1858,

1880, 1903; Colombia, 1824, 1846; Congo (Kongo), 1891; Corea (Korea), 1882; Costa Rica, 1851; Canada, 1911; Cuba, 1902; Denmark, 1826; Dominican Republic, 1867; Ecuador, 1839; Egypt, 1884; Ethiopia, 1903; France, 1778, 1800, 1822, 1898, 1902, 1908; German Empire, 1871, 1900, 1906, 1907; Great Britain 1794, 1815, 1827, 1902; Greece, 1837; Hanover, 1840, 1846, 1861; Hanseatic Republics, 1827; Hayti, 1864; Honduras, 1864; Italy, 1871, 1900, 1909; Japan, 1854, 1857, 1858, 1864, 1866, 1878, 1894, 1911; Liberia, 1862; Madagascar, 1867, 1881; Mecklenberg-Schwerin, 1847; Mexico, 1831, 1883, 1885, 1886; Morocco, 1787, 1836; Muscat, 1833; Netherlands, 1782, 1839, 1852, 1907; Nicaragua, 1867; Oldenberg, 1847; Orange Free State, 1871; Ottoman Empire, 1830, 1862; Paraguay, 1859; Persia, 1856; Peru-Bolivia, 1836; Peru, 1851, 1870, 1887; Portugal, 1840, 1899, 1902; Prussia, 1785, 1799, 1828; Russia, 1832; Salvador, 1850, 1870, 1873; Samoan Islands, 1878, 1889; Sardinia, 1858; Servia, 1881; Siam, 1836, 1856; Spain, 1795, 1884, 1888, 1906, 1909; Sweden, 1783; Sweden and Norway, 1816, 1827; Switzerland, 1850, 1906; Tonga, 1886; Tripoli, 1796, 1805; Tunis, 1797, 1824; Two Sicilies, 1845, 1855; Venezuela, 1836, 1860; Zanzibar, 1886; and all favored nation or reciprocal agreements, treaties, conventions, and proclamations by the United States or between the United States and either of the nations specified above or any other nations.

7 A. LORSCH & Co.,
By THADDEUS S. SHARRETTS,
Office and P. O. Address, 165 Broadway, New York City.
McLAUGHLIN, RUSSELL, COE & SPRAGUE.

Endorsed: Custom house, New York. Received Dec. 11, 1913.

Report of the collector.

JAN. 15, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE,
Collector.

Stipulation.

Board of United States General Appraisers. Board Number Three.

In the matter of protests 728676, etc., of A. Lorsch & Co. et al.

It is hereby stipulated by and between the parties hereto:

1. That the merchandise covered by the protests enumerated on the schedule hereto appended was imported subsequent to October 3, 1913.

2. That the said merchandise was imported in the various vessels as named in the schedule hereto appended and identified by the respective protest and entry numbers.

3. That the said vessels are, and were at the time of shipment of the said merchandise, registered under the laws of the respective nations mentioned in the said schedule.

8 4. That each of the protests enumerated in the said schedule shall be deemed to be submitted on this stipulation.

Dated Jun. 13, 1914.

BERT HANSON,
Assistant Attorney General, for the United States.
MCLAUGHLIN, RUSSELL, COE & SPRAGUE,
For the Importers.

R. K. HILLIS.

Schedule.

Protest.	Importers.	Vessel.	Entry.	Date of entry.
728676	A. Lorsch & Co.	La Lorraine. The steamer La Lorraine is registered under the laws of France.	275339	10- 6-13
736737	Kraemer & Co.	Pr. Lincoln. The steamer President Lincoln is registered under the laws of the German Empire.	282144	10-10-13
740315	A. Leipzig (Inc.).	Tamba Maru. The steamer Tamba Maru is registered under the laws of Japan.	283803	10-22-13
740649	A. J. Dale.	Argentina. The steamer Argentina is registered under the laws of Austro-Hungary.	290730	10-18-13
740000	L. D. Bloch.	Prin. de Piemonte. The steamer Principe de Piemonte is registered under the laws of Italy.	303903	10-25-13
733435	H. Glass & Co.	Caronia. The steamer Caronia is registered under the laws of the British Empire.	315953	11-12-13

Decision of the board.

Board of United States General Appraisers, New York, August 7, 1914. In the matter of protests 728676/35109, etc., of A. Lorsch & Co. et al. against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

9 WAITE, General Appraiser: The claims in these protests relating to the classification of the merchandise have been abandoned, leaving for consideration only the question of 5 per cent discount arising under subsection 7 of paragraph J, section 4, tariff act of 1913. Following the board's decision on that subject, G. A. 7540 (T. D. 34246), we overrule the protests.

BYRON S. WAITE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Protest.	Importer.
728676/35109	A. Lorsch & Co.
733435/4567	Henry Glass & Co.
736757/10607	F. L. Kraemer & Co.
740000/16593	L. D. Bloch & Co.
740315/14803	A. Leipzig, Inc.
740649/15094	A. J. Dale.

(Endorsed:) United States Court of Customs Appeals. Filed Sep. 9, 1914. Arthur B. Shelton, clerk.

10 United States Court of Customs Appeals.

ALBERT LORSCH & CO. ET AL., v. THE UNITED STATES. } No. 1440.

Certificate of the Attorney General.

In pursuance of the act entitled "An Act to amend section 195 of the act entitled 'An act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals entitled, "No. 1440, Albert Lorsch & Co., et al., v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

11 United States Court of Customs Appeals.

A. LORSCH & CO., HENRY GLASS & CO., F. L KRAEMER, & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants, *vs.* THE UNITED STATES, APPELLEE. } No. 1440.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is en-

13 No. 1392.

The United States, appellant,
v.
G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,
v.
Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,
v.
William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,
v.
Park & Tilford, appellees.

No. 1396.

The United States, appellant,
v.
Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,
v.
The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Block & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

titled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importations the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

* * * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

14 United States Court of Customs Appeals.

A. LORSCH & Co., HENRY GLASS & Co., F. L. KRAEMER & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 1440.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, vs. The United States, appellee, No. 1353.

15 United States Court of Customs Appeals.

A. LORSCH & Co., HENRY GLASS & Co., F. L. KRAEMER & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
vs.
THE UNITED STATES, APPELLEE.
No. 1440.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

16 United States of America, ss.

The President of the United States of America to the honorable the Judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which Albert Lorsch & Company et al. are appellants and The United States is appellee, No. 1440, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed into the Supreme Court of the United States,
17 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 24,784. Supreme Court of the United States, No. 1040, October term, 1914. The United States vs. Albert Lorsch & Company et al. Writ of certiorari.

18 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
ALBERT LORSCH & COMPANY ET AL. } No. 1040.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
RUFUS W. SPRAGUE, JR.,
Counsel for Respondents.

June 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

19

Return to writ.

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari, and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of A. Lorsch & Co. et al. v. The United States, No. 1440, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Indorsed:) File No. 24,784. Supreme Court U. S., October term, 1915. Term No. 503. The United States, petitioner, vs. Albert Lorsch & Company et al. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,784. U. S. Court of Customs Appeals. Term No. 503. The United States, petitioner, vs. Albert Lorsch & Company et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,784.

O

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 504.

THE UNITED STATES, PETITIONER,

vs.

CULLMAN BROTHERS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

CULLMAN BROS. ET AL., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1410.

Transcript of record on appeal from the Board of United States General Appraisers.

Filed Jul. 16, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
James L. Gerry, attorney for appellants.
Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.

1 *Petition.*

United States Court of Customs Appeals.

CULLMAN BROS. AND E. ROSENWALD AND BRO.
vs.
THE UNITED STATES. } 1410.

To the Honorable the United States Court of Customs Appeals:

Your petitioners, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions of the Board of United States General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and the facts respecting the classification of certain merchandise and the rate of duty imposed thereon under such classification, respectfully pray that the said Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose pray that an order be entered requiring the said Board of Appraisers to return to said Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioners also pray for such other or further orders or relief in the premises as the statutes provide or to the court shall seem just.

The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioners complain are set forth in the annexed Schedule B, which is hereby referred to and made a part hereof.

Dated, New York, June 10th, 1914.

CULLMAN BROS.,
E. ROSENWALD & BRO., *Petitioners,*
By BROWN & GERRY,
Attorneys, 12 Broadway, New York City.

Schedule A.

The following are the importations and entries covered by this proceeding with the approximate dates thereof, and with
2 such other data as are convenient for purposes of identification: Decision May 13, 1914.

Entry in the name of Cullman Bros.

Entry No. 197322. Vessel, Ryndam. Entered July 22/13. Protest No. 726468/33820.

Entry in the name of E. Rosenwald & Bro.

Entry No. 139308. Vessel, Rotterdam. Entered May 19/13. Protest No. 731290/1885.

Schedule B.

The Board of United States General Appraisers has confirmed the action of the collector of the port in assessing and exacting duty, under the authority of the tariff act of October 4, 1913, on the merchandise herein, without allowing a discount of five per centum on said duties, thereby making errors of law and fact by failing to find, or finding the contrary of, the following propositions:

1. The merchandise covered by each entry herein was imported into the United States in a vessel of the Netherlands.

2. Duty was imposed on said merchandise by the tariff act of October 4, 1913, and was assessed under said act.

3. A discount of five per centum on the duties assessed should be allowed on said merchandise by virtue of subsection 7 of paragraph J of Section IV of said tariff act and the proviso of said subsection taken in conjunction with provisions of the convention of commerce and navigation between the Netherlands and the United States, proclaimed February 26, 1853.

4. The action of the collector in each case was erroneous and should be reversed.

5. The protests are well founded and should be sustained.

Endorsed: United States Court of Customs Appeals. Filed June 10, 1914. Arthur B. Shelton, clerk.

3 *Mandate.*

Mandate issued June 10, 1914.

ARTHUR B. SHELTON, *Clerk.*

Bond.

Bond of Allan R. Brown in the sum of twenty-five dollars approved by O. M. Barber, associate judge. Filed June 10, 1914.

Notice of appearance.

Gerry & Wakefield, attorneys and counsellors at law,
12 Broadway.

NEW YORK, *July 13, 1914.*

Mr. ARTHUR B. SHELTON,
Clerk, U. S. Court of Customs Appeals,
15th St. and New York Ave., Washington, D. C.

DEAR SIR: Please note that I appear as attorney for the appellant in the place and stead of Brown & Gerry in suit No. 1410, entitled Cullman Brothers et al., vs. United States.

Respectfully,

JAMES L. GERRY.

Consented to.

ALLAN R. BROWN.

Endorsed: United States Court of Customs Appeals. Filed July 14, 1914. Arthur B. Shelton, clerk.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss.

Cullman Bros. et al., appellants, vs. The United States, appellee. Board's protest Nos. 726468, etc., collectors Nos. 33820, etc., suit No. 1410.

The petitioner above named having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the tenth day of June, 1914, required the board to transmit to said court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

4

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protests 726468/33820 and 731290/1885, with the reports of the collector of customs thereon;

2. Stipulation of counsel;

3. A copy of the board's decision in question, Abstract 35619 (T. D. 34459).

Witness The Honorable Jerry B. Sullivan, president of the board, this 19th day of June, A. D. 1914.

[SEAL.]

O. D. MADGE, *Chief Clerk.*
G. V. O.

Five per cent discount.
(Seal.)

Protest 726468/33820.

Cullman Bros., packers of domestic cigar leaf tobaccos, 174 Water St.

NEW YORK, *November 17, 1913.*

Notice of protest against assessment of duty on 38 bales (in cases) leaf tobacco. Bond No. 66,547; steamer, Ryndam, arrived, July 22, 1913.

Marks and numbers ◇ #884/886, 915/917, 928/931, 934/935, 953/954, 959, 961, 972, 978/980, 1322/1325, 1340/1348, 1396/1400.

Entry 197822.

We claim the 5 per centum discount under Section IV, paragraph J, subsection 7, of the tariff law of October 3, 1913.

Respectfully,

CULLMAN BROS.

To the COLLECTOR OF CUSTOMS, *Port of New York.*

5 Endorsed: Customhouse, New York. Received Nov. 18, 1913.

Protest 726468/33820.—Cullman Bros. (Disc. Am. vessels).

To the BOARD OF UNITED STATES GENERAL APPRAISERS:

Please take notice that we appear as attorneys in the matter of the above protest and that notice of all proceedings connected therewith and the decisions thereon should be sent to us at the address below.

STRAUSS & HEDGES,
12 Broadway, New York City.
BROWN & GERRY, *Counsel.*

Report of the collector.

DECEMBER 5, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the present tariff act, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33647.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Protest 731290/1885.

W. H. Stiner & Son, 10-12 Broadway, N. Y.

NEW YORK, *July 14, 1914.*

Hon. COLLECTOR OF CUSTOMS, *Port of New York.*

SIR: Notice of dissatisfaction is hereby given with and protest is hereby made against your ascertainment and liquidation of duties

and your decision assessing duty under the tariff act of October 3, 1913, as follows:

6 We claim under section 4, paragraph J, subsection 7 of the tariff act of 1913 a discount of 5% on all duties imposed by this act upon all merchandise covered by the entry herein specified, imported in vessel admitted to registration under the laws of the United States or imported in vessel as specified below, by virtue of treaties as specified below, or any subsequent treaty terminating or modifying any of said treaties.

We claim further that the duty on each and every item of merchandise covered by said entry is entitled to said 5% discount, both by virtue of said section 4, paragraph J, subsection 7, and by virtue of a treaty or treaties made between the United States and the country of exportation, or between the United States and the country where part or all of said merchandise was produced, or between the United States and the country under whose flag the vessel conveying said merchandise sails, or by either said section or said treaty or treaties.

We claim further that the duty on each and every item of merchandise covered by the entry herein specified is entitled to said discount of 5% by virtue of the fact that a discount of 5% is allowed or has been granted in the case of merchandise imported in a vessel of the registration of the United States, or has been allowed in the case of merchandise, the growth, production, or exportation of other countries or shipped in the vessels of other countries.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and the demand for the repayment thereof and a readjustment or liquidation of the entry in accordance with the claims is hereby made.

The marks and numbers below enumerated are subject to errors of omission or otherwise and are given without prejudice.

Entry Nos. E 139308, B 59000. Date of entry, May 19, 1913. Liquidated, withdrawal paid Dec. 29, 1913. Vessel, Rotter-
7 dam. How registered, Netherlands. Treaty, Netherlands and other treaties, etc., specified below. Marks and Nos. 3409 one bale leaf tobacco and various as per invoices and entries.

Treaties.

Argentine Republic, 1853; Austria Hungary, 1829; Belgium, 1845, 1858, 1863, 1875; Bolivia, 1858; Borneo, 1850; Brazil, 1828; Bulgaria, 1906; Chile, 1832, 1833; China, 1844, 1858, 1880, 1903; Colombia, 1824, 1846; Congo (Kongo), 1891; Corea (Korea), 1882; Costa Rica, 1851; Canada, 1911; Cuba, 1902; Denmark, 1826; Dominican Republic, 1867; Ecuador, 1839; Egypt, 1884; Ethiopia, 1903; France, 1778, 1800, 1822, 1898, 1902, 1908; German Empire, 1871, 1900, 1906, 1907, 1907; Great Britain, 1794, 1815, 1827, 1902; Greece, 1837; Hanover, 1840, 1846; Hanseatic Republics, 1827; Hayti, 1864; Honduras,

1864; Italy, 1871, 1900, 1909; Japan, 1854, 1857, 1858, 1864, 1866, 1878, 1894, 1911; Liberia, 1862; Madagascar, 1867, 1881; Mecklenberg-Schwerin, 1847; Mexico, 1831, 1883, 1885, 1886; Muscat, 1833; Netherlands, 1782, 1839, 1852, 1907; Nicaragua, 1867; Oldenburg, 1847; Orange Free State, 1871; Ottoman Empire, 1830, 1862; Paraguay, 1859; Persia, 1856; Peru-Bolivia, 1836; Peru, 1851, 1870, 1887; Portugal, 1840, 1899, 1902; Prussia, 1785, 1799, 1828; Russia, 1832; Salvador, 1850, 1870, 1873; Samoan Islands, 1878; Sardina, 1838; Servia, 1881; Siam, 1833, 1856; Spain, 1795, 1884, 1884, 1888, 1906, 1909; Sweden, 1783; Sweden and Norway, 1816, 1827; Switzerland, 1850, 1906; Tongo, 1886; Tripoli, 1796; Tunis, 1797, 1824; Two Sicilies, 1845, 1855; Venezuela, 1836, 1860; Zanzibar, 1886; and all favored nation or reciprocal agreements, treaties, conventions and proclamations by the United States or between the United States and either of the nations specified above or any other nation.

E. ROSENWALD & BRO.,
?????????? *Atty.*

Endorsed: Customhouse, New York. Received Jan. 14, 1914.

8 Protest No. 731290/1885.

To the Board of United States General Appraisers:

Please take notice that we appear as attorneys in the matter of the above protest and that notice of all proceedings connected therewith, and the decisions thereon, should be sent to us at the address below. .

STRAUSS & HEDGES,
12 Broadway, New York City.
BROWN & GERRY, *Counsel.*

Report of the collector.

NEW YORK, *Feb. 4, 1914.*

Respectfully referred to the Board of U. S. General Appraisers for decision.

The merchandise in question was entered and liquidated in accordance with the provisions of the act of August 5, 1909, more than 30 days prior to the lodging of the protest. No reliquidation has been made under the act of October 3, 1913. Upon the withdrawal enumerated herein, made within 30 days prior to the date of filing the protest and after October 3, 1913, duty was collected at the liquidated rate for the reason that the merchandise is subject to the same rate of duty under both acts. Following the instructions contained in T. D. 33847, no deduction or discount was allowed because of the vessel's registry. Note T. D. 22805, 23074, and 33949.

The required fee has been deposited.

Note T. D. 33817.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

Before the Board of United States General Appraisers. In the matter of protest 726468/33820 of Cullman Bros., and protest 731290/1885 of E. Rosenwald & Bro.

9 It is hereby stipulated and agreed by and between the parties hereto that the merchandise covered by the above-entitled protests consists of unstemmed wrapper tobacco, the product of the soil and industry of Sumatra, and that Sumatra is a colony or dominion of the Netherlands.

It is further stipulated and agreed that the merchandise covered by protest 726468/33820 was imported into the United States from Rotterdam in the vessel "Ryndam" on or about July 22, 1913; that said vessel is, and was at the time of the importation of said merchandise, a vessel of the Netherlands; that when said merchandise was imported it was entered without payment of duty and under bond for warehousing and remained in bonded warehouse until October 4, 1913, or after.

It is further stipulated and agreed in regard to protest 731290/1885 that the merchandise was imported into the United States from Rotterdam in the vessel "Rotterdam" on or about May 19, 1913; that said vessel is, and was at the time of the importation of said merchandise, a vessel of the Netherlands; that when said merchandise was imported it was entered without payment of duty and under bond for warehousing and remained in bonded warehouse until December 29, 1913, upon which date the goods were withdrawn for consumption and duty paid.

It is further stipulated and agreed that the collector assessed duty on the merchandise herein in accordance with paragraph 181 of the tariff act of October 3, 1913; that the collector did not allow a discount of 5% on said duties or any other reduction or allowance; that these protests may be submitted for decision on this stipulation and the official record in each case.

STRAUSS & HEDGES,
Attorneys for Importers.

NEW YORK, *February 24, 1914.*

10 WM. L. WEMPLE,
Asst. U. S. Attorney General, Attorney for United States.

Endorsed: U. S. Gen. Apprs. Received Feb. 25, 1914.

Decision of the board.

Board of United States General Appraisers, New York, May 13, 1914. In the matter of protests 726468/33820 and 731290/1885 of Cullman Bros. and E. Rosenwald & Bro., against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The claim in these cases seems to be under what is known as the 5 per cent discount clause of the act of

1913, found in subsection 7 of paragraph J of said act. These cases being governed by the decision in G. A. 7540 (T. D. 34246), the protests are overruled.

BYRON S. WAITE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed June 20, 1914. Arthur B. Shelton, clerk.

11 United States Court of Customs Appeals.

CULLMAN BROS. AND E. ROSENWALD & BRO.
v.
THE UNITED STATES. } No. 1410.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1410, Cullman Bros. and E. Rosenwald & Bro. v. The United States," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

12 United States Court of Customs Appeals.

CULLMAN BROTHERS, E. ROSENWALD & BRO., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1410.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

13 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

14 No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem

No. 1394.

The United States, appellant,
v.
William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

No. 1395.

The United States, appellant,
v.
Park & Tilford, appellee.

No. 1396.

The United States, appellant,
v.
Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,
v.
The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,
v.
The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,
v.
The United States, appellee.

from the amount so ascertained. As to such importations the decision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

15 United States Court of Customs Appeals.

CULLMAN BROTHERS, E. ROSENWALD & BRO., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1410.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

16 United States Court of Customs Appeals.

CULLMAN BROTHERS, E. ROSENWALD & BRO., APPELLANTS,
vs.
THE UNITED STATES, APPELLEE. } No. 1410.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

17 United States of America, ss.

The President of the United States of America to the Honorable the Judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which Cullman Brothers et al. are appellants and The United States is appellee, No. 1410, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed into the Supreme Court of the United States
18 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

19 (Indorsed:) File No. 24,785. Supreme Court of the United States, No. 1041, October term, 1914. The United States vs. Cullman Bhothers et al. Writ of certiorari.

20 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
CULLMAN BROS. ET AL. } No. 1041.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record

on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
JAMES L. GERRY,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

21 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of Cullman Brothers et al. v. The United States, No. 1410, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the Clerk, Supreme Court U. S. Received June 29, 1915.

22 (Indorsed:) File No. 24,785. Supreme Court U. S., October term, 1915. Term No. 504. The United States, petitioner, vs. Cullman Brothers et al. Writ of certiorari and return. Filed June 29, 1915.

File No. 24,785. U. S. Court of Customs Appeals. Term No. 504. The United States, petitioner, vs. Cullman Brothers et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,785.

WASHINGTON: GOVERNMENT PRINTING OFFICE: 1915

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 505.

THE UNITED STATES, PETITIONER,

vs.

G. W. FABER, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
G. W. FABER, INC., APPELLEES. } No. 1392.

Transcript of record on appeal from the Board of United States General Appraisers.

William L. Wemple, Assistant Attorney General, attorney for appellant.

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed May 28, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
(Stamped:) Office of the clerk Supreme Court U. S. Received June 12, 1915.

UNITED STATES COURT OF CUSTOMS APPEALS.

No. 1392.

THE UNITED STATES, *Appellant*,

vs.

G. W. FABER, INC., *Appellees.*

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PETITION.—United States Court of Customs Appeals. The United States, Appellant, v. G. W. Faber, Inc., Appellees. No. 1392. Original.

To the Honorable the United States Court of Customs Appeals: Your petitioner, being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said Board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied, are set forth in the annexed Assignment of Errors.

Dated, New York, N. Y., May 4, 1914. Wm. G. McAdoo, Secretary of the Treasury, Petitioner. By Wm. L. Wemple, Assistant Attorney General, Attorney for Appellant, 641 Washington Street, New York, N. Y. F. S. S.

ASSIGNMENT OF ERRORS. The Board of United States General Appraiser has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.

3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

SCHEDULE A. Following are the importations and entries covered by this proceeding with such other data as are convenient for purposes of identification: Decided March 6, 1914. Port of New York.

Protest No. 726474/34574. Vessel, Havana. Entered October 7, 1913. Entry No. 278346.

Endorsed: United States Court of Customs Appeals. Filed, May 5, 1914. Arthur B. Shelton, Clerk.

MANDATE.—Mandate issued May 5, 1914. Arthur B. Shelton, Clerk.

NOTICE OF APPEARANCE.—Brown & Gerry, Attorneys and Counsellors-at-law, 12 Broadway, New York. May 7, 1914.

Arthur B. Shelton, Esq., Clerk, U. S. Court of Customs Appeals, 15th Street and New York Avenue, Washington, D. C.

Sir: Please note that we appear as attorneys for the appellee in United States vs. G. W. Faber, Inc., No. 1392.

Respectfully, Brown & Gerry.

Endorsed: United States Court of Customs Appeals. Filed May 8, 1914. Arthur B. Shelton, Clerk.

RETURN OF THE BOARD.—United States of America, Board of United States General Appraisers, New York, ss.: United States, Appellant, vs. G. W. Faber, Inc., Appellee. Board's Protest No. 726474; Collector's No. 34574; Suit No. 1392.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court, having by order, dated the 5th day of May, 1914, required the Board to transmit to said Court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the records, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question, with the report of the collector of customs thereon;

2. Stipulations of counsel, dated December 16 and December 23, 1913;

3. Copy of the decision of the Board, G. A. 7540 (T. D. 34246).

Witness The Honorable Jerry B. Sullivan, President of the Board, this 15th day of May, A. D., 1914. D. P. Dutcher, Acting Chief Clerk. G. V. O. (Seal.) Five per cent. discount.

PROTEST 726474/34574.—New York, Dec. 5, 1913.

Hon. Collector of Customs, Port of New York, Sir: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment and liquidation of duties, and your decision assessing duty, on the entries below named. The reasons for objection are as follows:

You have failed to allow a discount of five per centum on the duties imposed on the merchandise covered by said entries. Said merchandise is entitled to such discount by virtue of Subsection 7 of paragraph J of Section IV of the Tariff Act of October 3, 1913. If not as aforesaid, said merchandise is entitled to such discount by virtue of Subsection 7 and the proviso thereof taken in conjunction with the provisions of the treaty or treaties concluded between the United States and the nation or country in whose vessel said merchandise was imported, or the nation or country of exportation. Under said treaties no other or higher duties can be levied on said merchandise than when imported in vessels admitted to registration under the laws of the United States, or than like merchandise from other countries is liable to. Note for example treaties with Austria-Hungary, 1829; Belgium, 1875; China, 1880; Denmark, 1826; France, 1822; Great Britain, 1815; Greece, 1837; Italy, 1871; Japan, 1894; Netherlands, 1852; Prussia, 1828; Sweden (including Norway), 1827; and other reciprocal treaties and conventions.

The reasons for objections in this protest are set forth in respect to each entry or payment below named. The excess is paid under compulsion, to obtain and retain possession of said merchandise or articles, and you and the government are held liable for the same, and a demand for the repayment thereof, and for a readjustment or liquidation of the entries in accordance with the above claims, is hereby made.

The offer is hereby made to furnish evidence to the Board of United States General Appraisers, on reasonable notice from them, of the facts involved, and in support of the contentions, herein.

Entry No. 278346; Vessel, Havana; Entered Oct. 7/13; Bond No. C; Liquidated, Nov. 11/13; Marks and Nos. various as per entries and invoices.

Respectfully, G. W. Faber, Inc. By Strauss & Hedges, Attorneys 12 Broadway, New York City. Brown & Gerry, Counsel.

REPORT OF THE COLLECTOR.—December 8, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the Appraiser's return on the invoice at the appropriate rate applicable under the provisions of the Act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within statutory time.

Dudley Field Malone, Collector.

Endorsed: Custom House, New York. Received Dec. 5, 1913.

STIPULATION.—Before the Board of United States General Appraisers. In the matter of Protest 726474/34574, of G. W. Faber, Inc.

It is hereby stipulated and agreed by and between the parties hereto that the merchandise covered by the above entitled protest consists of cigars, the product of the soil and industry of Cuba; that said merchandise was imported into the United States from Cuba in the vessel "Havana"; that said vessel is, and was at the time of the importation of said merchandise, admitted to registration under the laws of the United States; that the Collector assessed duty on said merchandise in accordance with Paragraph 185 of the Tariff Act of October 3, 1913, with a reduction of twenty per centum of said duties in accordance with Article II, of the Convention between the United States and the Republic of Cuba, T. D. 24836, and Paragraph B of Section IV of said Tariff Act of 1913; that the Collector did not allow a discount of five per centum on said duties or any other discount reduction or allowance except as beforementioned; that this protest may be submitted for decision on this stipulation and the official record without being first placed upon the docket of the Board of Appraisers.

New York, December 16, 1913.

Strauss & Hedges, Attorneys for Importer.

Wm. L. Wemple, Assistant Attorney General, Atty. for the United States.

Endorsed: U. S. Gen. Apprs. Received Dec. 23, 1913.

STIPULATION.—Before the Board of United States General Appraisers. In the Matter of Protest 726474, of G. W. Faber, Inc.

It is stipulated that Cuba is "another foreign country" within the meaning of those, or equivalent, words in the treaties respecting the granting of favors of commerce and navigation, which exist

between this and other nations, commonly referred to as most favored nation treaties.

It is also stipulated that merchandise, the product of the soil and industry of the countries with which the United States has such treaties is frequently imported into the United States in the ships of such countries; and that merchandise the product of the soil and industry of countries with which the United States has no such treaties, is frequently imported into the United States in ships of such countries.

Dec. 23, 1913.

Wm. L. Wemple, Assistant Attorney General, Atty. for the United States.

Strauss & Hedges, Attorneys for the Importers.

Endorsed: U. S. Gen. Apprs. Received Jan. 2, 1914.

DECISION OF THE BOARD.—(T. D. 34246—G. A. 7540.) United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, 726474, etc., of J. Elliott & Co., G. W. Faber, Inc., *et al.*, against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, *General Appraiser:* The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

"The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same

reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37), the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular

legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United

States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel,

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clause, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country. (Treaties, Conventions, International Acts, Protocols, and Agree-

ments between the United States and Other Powers, 1776-1909, vol. 1, p. 30; 8 Stat. L., 228.)"

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate *ex proprio vigore*. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court. [Italics are ours.]"

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force, and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the *specific* provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith, which can

scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, then are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the 'treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, *supra*, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, *et seq.*)

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 *et seq.*). Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the

power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which *imported* goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not *impose* a duty; it *grants a reduction* for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

Byron S. Waite, H. M. Somerville, Eugene G. Hay, Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 16, 1914. Arthur B. Shelton, Clerk.

UNITED STATES COURT OF CUSTOMS APPEALS

THE UNITED STATES
v.
G. W. FABER, INC. } No. 1392.

Certificate of the Attorney General.

In pursuance of the Act entitled "An Act to amend section 195 of the Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1392, The United States v. G. W. Faber, Inc.," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914.
United States Court of Customs Appeals
ARTHUR B. SHELTON, *Clerk.*

THE UNITED STATES COURT OF CUSTOMS APPEALS

THE UNITED STATES, APPELLANT,
vs.
G. W. FABER, INC., APPELLEE. } No. 1392.

The above entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11 and 12, 1914.

UNITED STATES COURT OF CUSTOMS APPEALS.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present the Honorable Robert M. Montgomery, Presiding Judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries and George E. Martin, Associate Judges.

The court was opened for business in due form.

The M. H. Pulaski Co.,
Johnson & Faulkner,
John Pullman & Co.,
Appellants,
No. 1346.

v.

The United States,
Appellee.

R. B. Henry Co.,
Wiener Brothers,
Lehn & Fink,
W. A. Taylor & Co.,
J. S. Plummer & Co.,
Mecke & Co.,
J. Wile Sons & Co.,
Appellants,
No. 1353.

v.

The United States,
Appellee.

J. Elliott & Co.,
Samstag & Hilder Brothers,
Appellants,
No. 1355.

v.

The United States,
Appellee.

Robert Muller & Co.,
Appellant,
No. 1364.

v.

The United States,
Appellee,

Wood & Selick,
Louis Meyer & Son,
Appellants,
No. 1370.

v.

The United States,
Appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is—

Ordered

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said Board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said Board with respect thereto is reversed.

Cullman Brothers,
E. Rosenwald & Bro.,
Appellants,
No. 1410.
v.
The United States,
Appellee.

A. Lorsch & Co.,
Henry Glass & Co.,
F. L. Kraemer & Co.,
L. D. Bloch & Co.,
A Leipzig Inc.,
A. J. Dale,
Appellants,
No. 1440.
v.
The United States,
Appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

UNITED STATES COURT OF CUSTOMS APPEALS.

THE UNITED STATES, APPELLANT,
vs.
G. W. FABER, INC., APPELLEE. } No. 1392.

For the opinion of the court in the above entitled appeal see transcript of record in the case of R. B. Henry Co. et al, appellants, *vs.* The United States, appellee, No. 1353.

UNITED STATES COURT OF CUSTOMS APPEALS.

THE UNITED STATES, APPELLANT,
vs.
G. W. FABER, INC., APPELLEE. } No. 1392.

I, Arthur B. Shelton, Clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeals, as the same remain of record and on file in this office.

Witness my hand and the seal of this court, this 11th day of June A. D. 1915.

ARTHUR B. SHELTON, *Clerk.*

[Seal of the United States Court of Customs Appeals.]

○

32 United States of America, ss.

The President of the United States of America to the honorable the Judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and G. W. Faber, Incorporated, is appellee, No. 1392, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed

33 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 24,786. Supreme Court of the United States, No. 1042, October term, 1914. The United States vs. G. W. Faber, Inc. Writ of certiorari.

34 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
G. W. FABER, INC. } No. 1042.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
ALLAN R. BROWN,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

35 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and com-

plete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. G. W. Faber, Inc., No. 1392, is a full, true, and complete transcript of the record and proceedings in in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

36 (Indorsed:) File No. 24,786. Supreme Court U. S., October term, 1915. Term No. 505. The United States, petitioner, vs. G. W. Faber, Inc. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,786. U. S. Court of Customs Appeals. Term No. 505. The United States, petitioner, vs. G. W. Faber, Inc. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,786.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 506.

THE UNITED STATES, PETITIONER,

vs.

LOUIS MEYERS & SON.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
LOUIS MEYERS & SON, APPELLEES. } No. 1393.

Transcript of Record on Appeal From the Board of United States General Appraisers.

William L. Wemple, Assistant Attorney General, attorney for appellant.

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed May 28, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
(Stamped:) Office of the clerk Supreme Court U. S. Received June 12, 1915.

1 *Petition.*

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
LOUIS MEYERS & SON, APPELLEES. } No. 1393. Original.

To the Honorable the United States Court of Customs Appeals:

Your petitioner, being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied are set forth in the annexed assignment of errors.

Dated, New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner,
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.
3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4 tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this proceeding, with such other data as are convenient for purposes of identification: Decided March 6, 1914. Port of New York. 2 Protest No. 727675/34739. Vessel, Krooland. Entered Sept. 16, 1913. Entry No. 255478.

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
LOUIS MEYERS & SON, APPELLEES. } No. 1393.

SIR: Please take notice that the appellees, Louis Meyers & Son, appear in this action, and that we are retained by and appear for the said appellees.

Yours, etc.,

BROOKS & BROOKS,
Attorneys for Appellees.

(Office and P. O. address, 12 Broadway, Borough of Manhattan, City of New York.)

To ARTHUR B. SHELTON, Esq., *Clerk.*

Dated, New York, May 9, 1914.

Endorsed: United States Court of Customs Appeals. Filed May 11, 1914. Arthur B. Shelton, clerk.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss.

The United States, appellant, vs. Louis Meyers & Son, appellee. Board's Protest No. 727675. Collector's No. 34739. Suit No. 1393.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and

3 fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court having by order dated the fifth day of May, 1914, required the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. A copy of the protest in question and the report of the collector of customs thereon;

2. A copy of the stipulation of counsel;

3. A copy of the board's decision in question, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 20th day of May, A. D. 1914.

[SEAL.]

O. D. MADGE,
Chief Clerk.
G. V. O.

Five per cent discount—American vessels.

(Copy.)

Protest 727675/34739.

NEW YORK, *Dec. 6.*

SIR: Protest is made against your liquidation and assessment of duty on entry for all merchandise assessed under act of 1913 and other merchandise of the same character more particularly described on entry and invoices by marks and numbers, imported in the vessel named below. The reasons for objection to your action are that the goods are more aptly and specifically covered by the provisions mentioned herein than by those under which duty has been assessed. It is claimed that the goods in question are dutiable or are exempt from duty under the tariff act of October 3, 1913, as follows:

4 The merchandise is entitled to a discount of 5 per cent on all duties assessed thereon perforce the provisions of subsection 7, paragraph J, of section 4 of said act, and the treaty between the United States and Belgium, March 8, 1875.

Protest is also made against the payment of all duties not legally chargeable upon said importation, and payment of the amount exacted is made under duress and compulsion to obtain and retain peaceable possession of the goods, holding you and the Government responsible for its return. Further information as to the details of

the foregoing claims can be obtained from the invoices and entries or will be furnished to the collector and to the General Appraisers, if needed by them or by either of them, on application to the undersigned; the marks and numbers noted herein and the endorsements hereon, are given without prejudice and simply for your convenience.

LOUIS MEYERS & SON,
By BROOKS & BROOKS,
Attorneys.

To the COLLECTOR OF CUSTOMS.

Entry No. 255478. Bond No. 75029. Vessel, Kroonland. Date of entry, Sept. 16/13. Date of liquidation, Dec. 3/13.

Copy.)

Report of the collector.—727675/34739.

JAN. 6, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision. Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847. The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

(Copy.)

Stipulation.

United States General Appraisers. Board No. 3.

In the matter of protests 727675/34739, of Louis Meyers & Son.

5 It is stipulated and agreed that the merchandise covered by the above-entitled protest was exported from Antwerp, Belgium, to the United States in the steamship Kroonland, and that said steamship Kroonland was admitted to registration under the laws of the United States at the time of and prior to the voyage in question. The protest is submitted for decision.

BROOKS & BROOKS,
Attorneys for the Importers.
WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.

Dated, New York, January 19, 1914.

the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Briain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

8 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for consideration. There seems

9 to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same

as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the langauge that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37), the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

11 "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises

12 over the importation of goods in other than American vessels.

It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, un-

der the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France or Germany or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial
13 treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominion of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities,

or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America;
14 and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776-1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals
15 has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article 1 of the Constitution of the United States, the most that can be said

with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force,
16 and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal and like favors extended to the United States.

The Constitution provides (Art. VI., clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under

the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith
17 which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

18 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the

United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the
19 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution,

which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 181a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition which
20 it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyrights. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant
21 relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

22 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354 et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session Twenty-eighth Congress, page 445 et seq.). Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular
23 country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory, and the question of their application is a political one and not within the jurisdiction of the courts. And besides they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

24 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

25 United States Sourt of Customs Appeals.

THE UNITED STATES, *v.* LOUIS MEYERS & SON. } No. 1393.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1393, The United States v. Louis Meyers & Son," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

26 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT, *vs.* LOUIS MEYERS & SON, APPELLEE. } No. 1393.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

27 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for con-

29 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
LOUIS MEYERS & SON, APPELLEE. } No. 1393.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

30 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
LOUIS MEYERS & SON, APPELLEE. } No. 1393.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeals, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

31 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which The United States is appellant and Louis Meyers & Son are appellees, No. 1393, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and re-

32 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

33 (Indorsed:) File No., 24,787. Supreme Court of the United States, No. 1043, October term, 1914. The United States vs. Louis Meyers & Son. Writ of certiorari.

34 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
LOUIS MEYERS & SON,
No. 1043.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO W. DAVIS,
Solicitor General.
FREDERICK W. BROOKS,
Counsel for Respondent.

JUNE 26, 1915.

Filed June 26, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

35 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. Louis Meyers & Son, No. 1393, is a full, true, and complete transcript of the record and proceedings in in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

36 (Indorsed:) File No. 24787. Supreme Court U. S., October term, 1915. Term No. 506. The United States, petitioner, vs. Louis Meyers & Son. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,787. U. S. Court of Customs Appeals. Term No. 506. The United States, petitioner, vs. Louis Meyers & Son. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,787.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 507.

THE UNITED STATES, PETITIONER,

vs.

WILLIAM OPENHYM & SONS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received Jun. 2, 1915.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS ET AL., APPELLEES. } No. 1394.

Transcript of record on appeal from the Board of United States General Appraisers.

William L. Wemple, Assistant Attorney General, attorney for appellant.

Filed May 28, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.

1 *Petition.*

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
WILLIAM OPENHYM & SONS AND A. WIMPFheimer & Bro., appellees. } No. 1394. Original.

To the honorable the United States Court of Customs Appeals:

Your petitioner being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied are set forth in the annexed assignment of errors.

Dated New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner,
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.
3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this
2 proceeding with such other data as are convenient for purposes of identification. Decided March 6, 1914. Port of New York.

Protest No.	Vessel.	Entered.	Entry No.
	William Openhym & Sons.		
726895/34879	New York	Oct. 7, 1913	277432
	A. Wimpfheimer & Bro.		
726912/34878	New York	Oct. 7, 1913	278308

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS AND A. WIMPFHEIMER & BRO., appellees. } No. 1394.

SIR: Please take notice that we appear for the appelle in this proceeding and demand that a copy of all papers herein be served upon us at our office, No. 32 Broadway, New York City.

Yours, &c.,

CURIE, SMITH & MAXWELL,
Attorneys for said Appellee.

Dated New York, May 7, 1914.

To William L. Wemple, Esq., Asst. Attorney General, and attorney for United States.

To clerk of U. S. Court of Customs Appeals.

Endorsed: United States Court of Customs Appeals. Filed May 8, 1914. Arthur B. Shelton, clerk.

3 *Return of the board.*

United States of America, Board of United States General Appraisers, New York, ss.

United States, appellant, vs. William Openhym & Sons and A. Wimpfheimer & Bro., appellees. Board's protest No. 726895, etc. Collector's No. 34879, etc. Suit No. 1394.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and

fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the fifth day of May, 1914, required the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. Protest 726895–34879 of William Openhym & Sons, with the report of the collector of customs thereon;
2. Stipulation of counsel;
3. Protest 726912–34878 of A. Wimpfheimer & Bro., with the report of the collector of customs thereon;
4. Stipulation of counsel.
5. Copy of the decision of the board, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 15th day of May, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount.

Protest 726895/34879.

NEW YORK, *December 8, 1913.*

COLLECTOR OF CUSTOMS, *New York.*

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on certain merchandise covered by the entries mentioned in the annexed Schedule A, which is hereby made a part hereof, claiming—

1. That said merchandise is entitled to a discount of 5 per centum of all duties charged or exacted by you or imposed thereon by the tariff act of October 3, 1913. Said discount accrues under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, for the reason that said merchandise was imported in a vessel or vessels admitted to registration under the laws of the United States.
2. In the alternative, that the effect of subsection 7 of paragraph J of Section IV is (a) to reduce the amount of duty by 5 per centum of the total amount charged, or exacted by you, or imposed by the paragraphs of said tariff act, or (b) to reduce said amount of duty by 5 per centum of the value of said merchandise.
3. That the merchandise is not dutiable at the rate or rates charged by you, and that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

We give notice that we pay all other rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods; that we hereby reserve all questions of law and fact, and are prepared to substantiate by proof every allegation of fact contained in the within protest. We claim the right of reasonable notice of the time and place when an opportunity will be afforded us to furnish such proof.

The references to statutes and other data herein given are for your convenience and are not to be taken as restricting this protest or relieving you from the duty of taking cognizance of all laws affecting said merchandise, whether cited herein or not.

5 Schedule A.

Vessel, New York. Nationality of vessel, United States. Date of entry, Oct. 7/13. Entry No. 277432. If warehouse W. H. Bond, c. Date of liquidation, Nov. 11/13. Marks and numbers of packages as per invoices and entries.

WILLIAM OPENHYM & SONS,
CURIE, SMITH & MAXWELL,
Attorneys, 32 Broadway, N. Y.

Endorsed: Customhouse, New York. Received, Dec. 10, 1913.

Report of the collector.

DEC. 17, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

In the matter of protest 726895/34879 of William Openhym & Sons, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants, that the merchandise covered by the protest above mentioned consists of veiling manufactured in France, imported by the S. S. New York of the American Line, entered at the port of New York on or about October 7, 1913, and covered by entry 277432; that said vessel is and was at the time of such importation admitted to registration under the laws of the United States, and that in liquidating the duties upon said

6 merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

It is also stipulated that like merchandise, the product of the soil and industry of France, is imported into the United States in ships of France, and that products of various countries with which the United States has most-favored-nation treaties are imported into the United States in the ships of such countries.

It is further stipulated that the above-mentioned protest may be deemed submitted upon the record and the foregoing stipulation as to the facts; such reasonable time for briefs as may be allowed by the board being reserved to both parties.

Dated, December 29, 1913.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the United States.
CURIE, SMITH & MAXWELL,
Attorneys for the Importers.

Protest 726912/34878.

NEW YORK, *December 9, 1913.*

COLLECTOR OF CUSTOMS, *New York.*

SIR: We hereby protest against your decision, liquidation, and assessment of duties as made by you on certain merchandise covered by the entries mentioned in the annexed Schedule A, which is hereby made a part hereof, claiming—

1. That said merchandise is entitled to a discount of 5 per centum of all duties charged or exacted by you or imposed thereon by the tariff act of October 3, 1913. Said discount accrues under and by virtue of subsection 7 of paragraph J of Section IV of said tariff act, for the reason that said merchandise was imported in a vessel or vessels admitted to registration under the laws of the United States.

2. In the alternative, that the effect of subsection 7 of paragraph J of Section IV is (a) to reduce the amount of duty by
7 5 per centum of the total amount charged or exacted by you, or imposed by the paragraphs of said tariff act, or (b) to reduce said amount of duty by 5 per centum of the value of said merchandise.

3. That the merchandise is not dutiable at the rate or rates charged by you, and that the duty exacted by you is not the legal duty chargeable upon said goods, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty.

We give notice that we pay all other rates than is claimed above as the legal rate under compulsion to obtain possession of our goods; that we hereby reserve all questions of law and fact, and are prepared to substantiate by proof every allegation of fact contained in the

within protest. We claim the right of reasonable notice of the time and place when an opportunity will be afforded us to furnish such proof.

The references to statutes and other data herein given are for your convenience and are not to be taken as restricting this protest or relieving you from the duty of taking cognizance of all laws affecting said merchandise, whether cited herein or not.

Schedule A.

Vessel, New York. Nationality of vessel, United States. Date of entry, Oct. 7/13. Entry No. 278308. If warehouse W. H. Bond, 79891. Date of liquidation, Nov. 24/13. Marks and numbers of packages, as per invoices and entries.

A. WIMPFHEIMER & BRO.,
CURIE, SMITH & MAXWELL,
Attorneys, 32 Broadway, N. Y.

Endorsed: Custom house, New York. Received, Dec. 10, 1913.

Report of the collector.

DEC. 17, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

8 Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

In the matter of protest 726912/34878 of A. Wimpfheimer & Brother, claiming 5% discount in duty.

It is stipulated and agreed by and between counsel for the Government and counsel for the protestants that the merchandise covered by the protest above mentioned consists of cotton velvets manufactured in England, imported by the S. S. New York, of the American Line, entered at the port of New York on or about October 7, 1913, and covered by entry 278308; that said vessel is and was at the time of such importation admitted to registration under the laws of the United States, and that in liquidating the duties upon said merchandise the collector disallowed the discount of 5 per centum ad valorem claimed by protestants to have accrued under subsection 7 of paragraph J of Section IV, act of October 3, 1913.

the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

11 "The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

12 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that

these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems
13 to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being, in our judgment, no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 33, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different
14 persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, inour opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

15 "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope

of it and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises
16 over the importation of goods in other than American vessels.

It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France or Germany or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial
17 treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be

so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America;
18 and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clause which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held

that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals
19 has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 253). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to perform a particular act*, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in force,
20 and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Consti-

tution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question therefore free from any of that anxiety respecting the preservation of our national faith,
21 which can scarcely be too easily awakened, or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"It is a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country.

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between

such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

22 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractural provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the

23 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition
24 which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can by a treaty previously entered into in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between
25 the two nations, the courts would be unable to grant relief

under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

26 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354 et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general

rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular
27 country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.
28 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof. As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by

this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protests 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816, 726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

29 BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Protest.	Importer.
726895/34879	William Openhym & Sons.
726912/34878	A. Wimpfheimer & Bro.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

30 United States Court of Customs Appeals.

THE UNITED STATES
v.
WILLIAM OPENHYM & SONS AND A. WIMPFHEIMER & BRO. } No. 1394.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1394, The United States v.

William Openhym & Sons and A. Wimpfheimer & Bro.," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals, Arthur B. Shelton, clerk.

81 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. | No. 1394.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

82 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,
v.
The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,
v.
The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,
v.
The United States, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,

v.

The United States, appellee.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

34 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. } No. 1394.

For the opinion of the court in the above-entitled appeals see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

35 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
WILLIAM OPENHYM & SONS, A. WIMPFHEIMER & BRO., APPELLEES. } No. 1394.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above-entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON, *Clerk.*

36 United States of America, ss.

The President of the United States of America to the honorable the Judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which the United States is appellant and William Openhym & Sons et al. are appellees, No. 1394, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein

should be certified by the said Court of Customs Appeals and
37 removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

38 (Indorsed:) File No. 24,788. Supreme Court of the United States, No. 1044, October term, 1914. The United States vs. William Openhym & Sons et al. Writ of certiorari.

39 In the Supreme court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
WILLIAM OPENHYM & SONS ET AL. } No. 1044.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
THOMAS M. LANE,
Counsel for Respondents.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

40 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. William Openhym & Sons et all., No. 1394, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the Clerk Supreme Court U. S. Received Jun. 29, 1915.

41 (Indorsed:) File No. 24, 788. Supreme Court U. S., October term, 1915. Term No. 507. The United States, petitioner, vs. William Openhym & Sons et al. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,788. U. S. Court of Customs Appeals. Term No. 507. The United States, petitioner, vs. William Openhym & Sons et al. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,788.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 508.

THE UNITED STATES, PETITIONER,

vs.

PARK & TILFORD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
PARK & TILFORD, APPELLEES.
No. 1395.

Transcript of record on appeal from the Board of United States General Appraisers.

William L. Wemple, Assistant Attorney General, attorney for appellant.

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed May 29, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
(Stamped:) Office of the clerk Supreme Court U. S. Received Jun. 12, 1915.

1

Petition.

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
PARK & TILFORD, APPELLEES.
No. 1395. Original.

To the Honorable the United States Court of Customs Appeals:

Your petitioner, being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decisions with which your petitioner is dissatisfied are set forth in the annexed assignment of errors.

Dated, New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner,
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.

3. In not holding that the protests herein were insufficient.
4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this
2 proceeding, with such other data as are convenient for purposes of identification: Decided March 6, 1914. Port of New York.

Protest No. 727399/36043. Vessel, "Saratoga." Entered Oct. 16, 1913. Entry No. 285799.

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

BENJAMIN A. LEVETT,
COUNSELOR AT LAW,
17 State Street, New York, May 8th, 1914.

ARTHUR B. SHELTON, Esq.,
Clerk U. S. Court of Customs Appeals, Washington, D. C.

DEAR SIR: Please take notice that I appear as attorney for th appellees in the case of the United States vs. Park & Tilford, sui No. 1395.

Respectfully, B. A. LEVETT.

Endorsed: United States Court of Customs Appeals. Filed Ma 11, 1914. Arthur B. Shelton, clerk.

Return of the board.

United States of America, Board of United States General A praisers, New York, ss.

United States, appellant, vs. Park & Tilford, appellees. Board protest No. 727399. Collector's No. 36043. Suit No. 1395.

The petitioner above named, having applied to the Unit States Court of Customs Appeals for a review of the qu
3 tions of law and fact involved in a decision of the Board United States General Appraisers in the above case, and said court having, by order dated the 5th day of May, 1914, requi

the board to transmit to said court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question with the report of the collector of customs thereon;
2. Stipulation of counsel;
3. Copy of the decision of the board, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 15th day of May, A. D. 1914.

[SEAL] D. P. DUTCHER,
Acting Chief Clerk.
G. V. O.

Five per cent discount.

Protest 727399/36043.

NEW YORK, *December 19, 1913.*

Please send all notices relating to this protest to Masters & Levett, 17 State Street, New York City.

Hon. COLLECTOR OF CUSTOMS, *Port of New York.*

SIR: We hereby protest against your liquidation and assessment of duty on all merchandise imported by us in the vessel and on the date named below, and covered by the entry below numbered on the ground that in making such assessment you have illegally and in violation of the law refused or neglected to allow a discount of five per cent of the duties.

We claim that in the liquidation and assessment of duties
4 on such merchandise a discount of five per cent of the duty should be allowed under and by virtue of paragraph J, Section IV, subsection 7 of the act of October 3, 1913.

We protest against the payment of all duties not legally chargeable upon said importation, and pay the amount exacted under duress and compulsion to obtain and retain peaceable possession of the goods, holding you and the Government responsible for its return.

PARK & TILFORD.
By MASTERS & LEVETT, *Attorneys.*

Entry No. 285799. Bond No. —. Vessel, Saratoga. Date of entry, Oct. 16/13. Date of liquidation, Nov. 20/13. Marks and Nos. —, and others as per invoice and entry.

Endorsed: Custom house, New York. Received Dec. 19, 1913.

Report of the collector.

DEC. 31, 1913.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

Before Board No. 3, U. S. General Appraisers.

In the matter of protest 727399 of Park & Tilford on discount of duty.

It is hereby stipulated and agreed that the merchandise covered by this protest consists of cigars, the product of Cuba, which were regularly imported into the United States in the S. S. Saratoga, and that said steamer is of American registry; and that facts appearing in other stipulations on this subject, now before the board may be considered as in this stipulation, so far as they are relevant.

The protest is submitted on this stipulation.

WM. L. WEMPLE,
Assistant Attorney General, Attorney for the U. S.
MASTERS & LEVETT,
Attorneys for the Importers, 17 State Street, New York City.

Dated New York, January 10, 1914.

Decision of the board.

(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, 727399, etc., of J. Elliott & Co., Park & Tilford et al., against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported

that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

8 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems

9 to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for

contingencies which it may seem wise to have specifically provided for justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.' 'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

"If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall im-

mediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, and the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it, and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises
12 over the importation of goods in other than American vessels.

It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably

does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146; T. D. 33434), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration, which needs, in our judgment, more extended discussion,
13 to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America;
14 and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agree-

ments between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance, and so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory; whether they are agreements between the high contracting parties to be performed in the future and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place, the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point, the Court of Customs Appeals has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question, or one to be submitted to the judicial branch of the Government, has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson (2 Pet., 252). Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract, when either of the parties engages to per-*

form a particular act, the treaty addresses itself to the political, not the judicial, department; and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in
16 force, and lack jurisdiction to compel the enforcement of the provisions in question, except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this questions therefore free from any of that anxiety respecting the preservation of our national faith,
17 which can scarcely be too easily awakened or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty, but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by

one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them; but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia, of any article, the produce or manufacture of the United States, than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

18 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractual provisions, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions; hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall

be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the
19 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution, such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the government and the nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition
20 which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, ac-

cording to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annul and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to grant
21 relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both Houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and

notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

22 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 254 et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eighth Congress, page 445 et seq.). Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7

23 does not extend any special favor to any particular country, but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their appli-

cation is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts, for the reason that they are opposed to the spirit and letter of the Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which

"shall be imported," which implies a future importation.

94 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is, therefore, overruled.

The protests here involved have been submitted upon stipulation between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protest 726808, 727693, 728560, and 729239; Norway, protest 727894; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816,

726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

25 United States Court of Customs Appeals.

THE UNITED STATES
v.
PARK & TILFORD. } No. 1395.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No. 1395, The United States v. Park & Tilford," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

26 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
PARK & TILFORD, APPELLEE. } No. 1395.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

27 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants,

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants.

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

28 No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

Said appeals having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban

30 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
PARK & TILFORD, APPELLEE. } No 1395.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true and complete transcript of the record and proceedings had in said court in the above entitled appeal, as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

31 United States of America, ss.

The President of the United States of America, to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which The United States is appellant and Park & Tilford are appellees, No. 1395, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and removed into the
32 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

(Indorsed:) File No. 24789. Supreme Court of the United States, No. 1045, October term, 1914. The United States vs. Park & Tilford. Writ of certiorari.

33 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
PARK & TILFORD. } No. 1045.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on

file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued hereon.

JNO. W. DAVIS,
Solicitor General.
B. A. LEVETT,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

34 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. Park & Tilford, No. 1895, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.]

ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received June 29, 1915.

35 (Indorsed:) File No. 24789. Supreme Court U. S., October term, 1915. Term No. 508. The United States, petitioner, vs. Park & Tilford. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24789. U. S. Court of Customs Appeals. Term No. 508. The United States, petitioner, vs. Park & Tilford. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24789.

○

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 509.

THE UNITED STATES, PETITIONER,

vs.

SELGAS & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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a United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
SELGAS & CO., APPELLEES. } No. 1396.

Transcript of record on appeal from the Board of United States General Appraisers.

WILLIAM L. WEMPLE, *Assistant Attorney General, Attorney for Appellant.*

Printed under the direction of the clerk.
Press of Byron S. Adams, Washington, D. C.
Filed May 29, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.
(Stamped:) Office of the clerk Supreme Court U. S. Received June 12, 1915.

1 *Petition.*

United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
v.
SELGAS & CO., APPELLEES. } No. 1396. Original.

To the Honorable the United States Court of Customs Appeals:

Your petitioner being dissatisfied with the decision of the Board of United States General Appraisers in each of the matters referred to in the annexed Schedule A, as to the assessment of duty on certain imported merchandise, and being dissatisfied also with the procedure of said board, as hereinafter specified, respectfully prays your court to review the questions involved therein, and for such relief in the premises as to the court shall seem just. The particulars of the errors of law and fact involved in said decision with which your petitioner is dissatisfied, are set forth in the annexed assignment of errors.

Dated, New York, N. Y., May 4, 1914.

WM. G. MCADOO,
Secretary of the Treasury, Petitioner.
By WM. L. WEMPLE,
Assistant Attorney General, Attorney for Appellant,
641 Washington Street, New York, N. Y.
F. L. L.

Assignment of errors.

The Board of United States General Appraisers has erred as follows:

1. In sustaining the protests herein.
2. In not affirming the assessment of duty herein.

3. In not holding that the protests herein were insufficient.

4. In holding that under subsection 7, paragraph J, section 4, tariff act of October 3, 1913, a discount of 5 per cent should have been allowed on goods imported in American vessels.

Schedule A.

Following are the importations and entries covered by this proceeding with such other data as are convenient for purposes of identification: Decided March 6, 1914. Port of New York.
2 Protest No. 727757/35463. Vessel, Havana. Entered Oct. 7, 1913. Entry No. 279190.

Endorsed: United States Court of Customs Appeals. Filed May 5, 1914. Arthur B. Shelton, clerk.

Mandate.

Mandate issued May 5, 1914.

ARTHUR B. SHELTON, *Clerk.*

Notice of appearance.

MAY 13, 1914.

Mr. ARTHUR B. SHELTON,
Clerk, United States Court of Customs Appeals, Washington.

SIR: Please take notice that we appear as attorneys for the appellees in the matter of the United States v. Selgas & Company, suit 1396, and we request notice of all proceedings therein be sent to us at the above address.

Respectfully,

McLAUGHLIN, RUSSELL, COE & SPRAGUE.
R. H. HILLS.

Endorsed: United States Court of Customs Appeals. Filed May 15, 1914. Arthur B. Shelton, clerk.

Return of the board.

United States of America, Board of United States General Appraisers, New York, ss.

United States, appellant, vs. Selgas & Co., appellees. Board's Protest No. 727757. Collector's No. 35463. Suit No. 1396.

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said court, having by order, dated the 5th day of May, 1914, required the board to trans-
3 mit to said court, the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case and also its decision thereon.

This return specifically comprises the following:

1. The protest in question with the report of the collector thereon;

2. The stipulation of counsel;

3. A copy of the decision of the board, G. A. 7540 (T. D. 34246).

Witness the Honorable Jerry B. Sullivan, president of the board, this 15th day of May, A. D. 1914.

[SEAL.]

D. P. DUTCHER,
Acting Chief Clerk.

G. V. O.

Five per cent discount.

Protest 727757/35463.

NEW YORK, *Dec. 15, 1913.*

Hon. COLLECTOR OF CUSTOMS, *Port of New York.*

SIR: Notice of dissatisfaction is hereby given with, and protest is hereby made against your ascertainment and liquidation of duties, and your decision assessing duty under the tariff act of October 3, 1913, on the mdse. covered by the entries below named. Said merchandise is not dutiable as assessed. In respect to each of said entries we claim as follows: That the duties assessed on said merchandise are subject to a discount of 5% for the reasons specified below.

We hereby give notice that this protest is intended to apply to all of the merchandise, articles, and payments included in or incident to the importations herein specified. The above claims are made under or by virtue of the tariff act of Oct. 3, 1913.

We further claim, under section 4, paragraph J, subsection 7 of the tariff act of 1913 a discount of 5% on all duties imposed by this act upon all merchandise covered by the entries herein specified, imported in vessels admitted to registration under the laws of the United States or imported in vessels as specified below, by virtue of treaties as specified below, or any subsequent treaty terminating or modifying any of said treaties.

We claim further that the duty on each and every item of merchandise covered by said entries is entitled to said 5% discount, both by virtue of said section 4, paragraph J, subsection 7, and by virtue of a treaty or treaties made between the United States and the country of exportation, or between the United States and the country where part or all of said merchandise was produced, or between the United States and the country under whose flag the vessel conveying said merchandise sails, or by either said section or said treaty or treaties.

We claim further that the duty on each and every item of merchandise covered by the entries herein specified is entitled to said discount of 5% by virtue of the fact that a discount of 5% is allowed or has been granted in the case of merchandise imported in a vessel of the registration of the United States, or has been allowed in the case of merchandise, the growth, production, or exportation of other countries or shipped in the vessels of other countries.

The excess is paid under compulsion to obtain and retain possession of said merchandise or articles, and the demand for the repayment thereof and a readjustment or liquidation of the entries in accordance with the claims is hereby made.

The marks and numbers below enumerated are subject to errors of omissions or otherwise and are given without prejudice.

Entry No. 279190. Date of entry, 10/7/13. Liquidated, 11/15/13. Vessel, Havana. How registered, American. Treaty, etc., specified below. Marks and Nos. various as per invoices and entries.

5 Treaties.

Algiers, 1815, 1816; Argentine Republic, 1853; Austria-Hungary, 1829; Belgium, 1845, 1858, 1863, 1875; Bolivia, 1858; Borneo, 1850; Brazil, 1828; Bulgaria, 1906; Chile, 1832, 1833; China, 1844, 1858, 1880, 1903; Colombia, 1824, 1846; Congo (Kongo), 1891; Corea (Korea), 1882; Costa Rica, 1851; Canada, 1911; Cuba, 1902; Denmark, 1826; Dominican Republic, 1867; Ecuador, 1839; Egypt, 1884; Ethiopia, 1903; France, 1778, 1800, 1822, 1898, 1902, 1908; German Empire, 1871, 1900, 1906, 1907; Great Britain, 1794, 1815, 1827, 1902; Greece, 1837; Hanover, 1840, 1846, 1861; Hanseatic Republics, 1827; Hayti, 1864; Honduras, 1864; Italy, 1871, 1900, 1909; Japan, 1854, 1857, 1858, 1864, 1866, 1878, 1894, 1911; Liberia, 1862; Madagascar, 1867, 1881; Mecklenberg-Schwerin, 1847; Mexico, 1831, 1883, 1885, 1886; Morocco, 1787, 1836; Muscat, 1833; Netherlands, 1782, 1839, 1852, 1907; Nicaragua, 1867; Oldenberg, 1847; Orange Free State, 1871; Ottoman Empire, 1830, 1862; Paraguay, 1859; Persia, 1856; Peru-Bolivia, 1836; Peru, 1851, 1870, 1887; Portugal, 1840, 1899, 1902; Prussia, 1785, 1799, 1828; Russia, 1832; Salvador, 1850, 1870, 1873; Samoan Islands, 1878, 1889; Sardinia, 1838; Servia, 1881; Siam, 1833, 1856; Spain, 1795, 1884, 1888, 1906, 1909; Sweden, 1783; Sweden and Norway, 1816, 1827; Switzerland, 1850, 1906; Tonga, 1886; Tripoli, 1796, 1805; Tunis, 1797, 1824; Two Sicilies, 1845, 1855; Venezuela, 1836, 1860; Zanzibar, 1886; and all favored nation or reciprocal agreements, treaties, conventions, and proclamations by the United States or between the United States and either of the nations specified above or any other nations.

SELGAS & CO.
By THADDEUS S. SHARRETTS,
Office and P. O. address, 165 Broadway, New York City.
McLAUGHLIN, RUSSELL, COE & SPRAGUE.

Endorsed: Custom house, New York. Received Dec. 15, 1913.

6 *Report of the collector.*

JAN. 10, 1914.

Respectfully referred to the Board of U. S. General Appraisers for decision.

Duty was assessed in accordance with the appraiser's return on the invoice at the appropriate rate applicable under the provisions of the act of October 3, 1913, without any discount being allowed or deduction made on account of the vessel's registry. Note T. D. 33847.

The protest was lodged and fee paid within the statutory time.

DUDLEY FIELD MALONE, *Collector.*

Stipulation.

The Board of United States General Appraisers.

In the matter of protest No. 727757/35463 of Selgas & Co.

It is hereby stipulated and agreed in the case of the above protest covering entry No. 279190—S. S. Havana, mdse.—tobacco.

1. That the tobacco in question was imported in the S. S. Havana, of the Ward Line, subsequent to Oct. 3, 1913.

2. That said S. S. Havana is and was at the time of shipment a vessel admitted to registration under the laws of the United States.

3. That the above protest shall be submitted on this stipulation and briefs to be filed.

WM. L. WEMPLE,
Assistant U. S. Attorney General for the United States.
THAD. S. SHARRETTS,
For the Importers.

Endorsed: U. S. Gen. Apprs. Received Jan. 15, 1914.

7 *Decision of the board.*

(T. D. 34246—G. A. 7540.)

United States General Appraisers, New York, March 6, 1914.

In the matter of protests 726469, 727757, etc., of J. Elliott & Co., Selgas & Co., et al., against the assessment of duty by the collector of customs at the port of New York. Before Board 3.

WAITE, General Appraiser: The tariff act of 1913, passed by Congress and approved by the President on the 3d day of October of that year, went into effect, according to the terms of the statute, on the following day. That act provides in some 386 different paragraphs for duties to be levied upon certain commodities imported into the United States. Among other provisions in the statute is subsection 7 of paragraph J of section 4, providing in substance that 5 per cent

discount shall be allowed upon goods imported into the United States in vessels subject to registration therein, provided that said subsection 7 shall not be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. Since this law went into effect dutiable goods from various countries of the world have been imported into the United States in vessels subject to registry in the United States, as well as in vessels subject to registry in other countries. Upon demand by the importers of goods in American vessels for a reduction of the duty by 5 per cent, as seems to be provided for in said subsection 7 of paragraph J, the collectors of the various ports where entries have been made have refused to make the reduction, and it appears from the briefs and records filed in the cases before us that this refusal has been prompted by an order from the Secretary of the Treasury, based upon an opinion by the Attorney General. The instruction to collectors, found in T. D. 33847, states that the Attorney General has advised that—

8 "The 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers, and that consequently the subsection, by the express terms of the proviso, is inoperative."

This opinion is evidently based upon the fact that there are existing between the United States and various countries treaties containing clauses known as the "most-favored-nation clauses"; and also treaties containing clauses which more specifically provide for reciprocal arrangements on behalf of the importation of goods into the United States and also into the country of the other contracting party; and also other clauses providing for equivalent or reciprocal courtesies as between other countries and the United States with reference to the importation of the products of the parties to the treaty into the ports of the other contracting party. Notably the latter is found in the treaty between the United States and Great Britain.

Succinctly stated, then, the claim of the Government is that subsection 7 is inoperative, and that no reduction of duty can be allowed upon goods arriving in the United States in American vessels. If this contention is sustained, that, as will be apparent, is the end of the case.

It is urged with considerable earnestness by the Government that because there are few importations in vessels of countries with whom we have not commercial treaties such as are here involved, and because of the consequent slight benefit to American shipping which would accrue should the law be enforced as written, therefore it was intended to postpone the enforcement of the law until the existing treaties should be abrogated, abandoned, or expire by lapse of time; that to enforce it now would place Congress in the absurd position of having enacted a law for so trifling a purpose.

9 We can not concur in this view. In our estimation, to place the law upon the statute books intending that it should

not be enforced would be much more absurd, it being conceded that there is subject matter over which it can operate. We are bound to apply the law so far as it is applicable to the present status, even though it results in benefits to shipping or shippers of other countries. We see nothing illogical or absurd in the thought that Congress enacted the law with the intent that it should be administered so as to most nearly accomplish its plain intent and purpose, with broadening field of operation, as treaties may be changed, abrogated, or expire by lapse of time.

The claim on the part of the importers is that the law should be enforced; that a reduction should be allowed to goods arriving in American vessels, and that such allowance being made, the same reduction of 5 per cent should be allowed upon all goods arriving in the United States in vessels of the countries with whom the United States has such commercial treaties as are above set forth. It is agreed that these questions shall be determined in one decision in case the contention of the Government is denied with reference to goods in American bottoms.

The statute which it is claimed is inoperative reads as follows:

"J. Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The language of this paragraph seems to be plain. In our judgment there is nothing left for construction. There seems to be no ambiguity in the language used. It must be conceded that the meaning of the word "affect" is practically the same as that of "impair," to wit, to make the treaty less beneficial to the other contracting party, or "affected" to the detriment of such party. There being in our judgment no ambiguity in this statute, the rule for its interpretation and construction is plain. In United States v. Goldenberg (168 U. S., 95), this being what may be termed a "tariff case," the court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

And in Bate Refrigerating Co. v. Sulzberger (157 U. S., 1, 36, 37) the following language was used:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But, as declared in Hadden v. Collector (5 Wall., 107, 111), 'what is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to
11 rest the judgment of the court in the interpretation of statutes.'
'Where the language of the act is explicit,' this court has said, 'there is great danger in departing from the words used to give an effect to the law which may be supposed to have been designed by the legislature.'"

The same principle was applied by the Circuit Court of Appeals in the Eighth Circuit to the construction of the tariff law in Rice v. United States (53 Fed., 910, 911):

"The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It can not substitute for the clear expressions which Congress has actually used other expressions, which the court think Congress ought to have used."

Very many more citations might be made to this point. We deem it unnecessary, however, as, in our opinion, there is but one rule for the construction of a statute written in plain language, as the one now under consideration.

It must be borne in mind also that we must avoid giving the proviso of the statute such a construction as will make the proviso repugnant to the body of the act. Savings Bank v. United States (19 Wall., 227).

It is urged, however, that the enforcement of this statute as it is written will abrogate or impair the provisions of some treaty with a foreign country now in force. We fail to see how there could be any construction placed upon it which would abrogate, impair, or affect the provisions of any treaty to which our attention has been called. Let us examine the provisions which it is claimed it will impair.

The most-favored-nation clauses in treaties are practically identical. As typical of these clauses, the most-favored-nation clause in the treaty of 1875 with Belgium may be quoted:

12 "If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely where it is freely granted to such other nation, or on yielding the same compensation when the grant is conditional."

The clauses providing for specifically reciprocal favors are to the effect that the United States will not levy any higher rate of duty upon goods imported into the United States in the vessels of the other country than are levied upon goods brought into the United States in its own vessels; and, reciprocally, it is provided that the other party to the treaty will not levy any greater rate of duties upon goods brought into its country in American vessels than is levied upon goods imported in its own vessels.

It is apparent that these treaties anticipate future changes in the tariff laws of the United States, similar to subsection 7, but they must be held to have been made with full knowledge of the constitutional limitations of the treaty-making branch of the Government. They are intended to apply to a future condition. Can it be said that when such condition arises, ant the scope and bearing of the treaty are extended to cover a condition anticipated when it is entered into, that that violates or abrogates the treaty, or impairs it in any manner? We think not. It rather tends to enlarge the scope of it and increases the benefits to be derived thereunder. Hence we hold that, even though this law is made operative to its fullest extent, and the reduction given of 5 per cent upon goods imported in American bottoms, it will not have the effect of abrogating or impairing any treaty. We therefore find that the law must be so administered as to allow 5 per cent discount from the duty on goods imported in American vessels.

This leads us to consider the question which naturally arises over the importation of goods in other than American
13 vessels. It is not the province of the court to abrogate a treaty, or even to determine whether it is in force, unless it be self-executing.

Let us first consider the question as to whether the enforcement of this statute compels a recognition of the right of treaty powers, under the most-favored-nation clauses, to the same concession or right extended to goods brought in in vessels subject to American registry, as provided in this statute.

This is not a statute extending a favor to any particular country. It is rather an offer made by the United States to importers, whether they be from one country or another, or whether they be from a place not within the jurisdiction of any country. The same privilege is extended to England as to France, or Germany, or Italy; that is, to bring in goods in American vessels and receive the 5 per cent discount from the regular duties of the tariff act. We do not think this violates the provisions of the most-favored-nation clause. And, further, we are of the opinion that if this act could be construed to be a preference extended to any nation with which we have dealings, the favor is extended for a consideration; that is, a party must go to the trouble to seek out American ships. This may involve, and probably does, extra trouble and expense in the selection of the vessel, in the assembling of the goods, in preparation for shipment, and

possibly in the extra effort necessary to procure an American vessel.

Holding these views, we see no necessity for citing or applying in this connection what seems to be the latest expression of the courts upon the self-executing qualities of most-favored-nation clauses, as found in American Express Co. v. United States (4 Ct. Cust. Appls., 146, T. D. 33484), known as the wood-pulp cases.

There is, however, another phase of this case presented for consideration which needs, in our judgment, more extended discussion, to wit, the question whether the specific commercial treaties, the provisions of which are exemplified by the following quotations from the treaty of 1829 with Austria-Hungary, are self-executing, such as can be enforced by judicial mandate.

"Article III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishment whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States in vessels of the said States may also be so imported in Austrian vessels without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

"Article IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country." (Treaties, Conventions, International Acts, Protocols, and Agreements between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228.)

The substance of the commercial treaties, of which there are many, dealing specifically with the importation of goods and the entry of

vessels into the ports of the various contracting parties, while varying in the letter, are practically the same in substance and, so far as the decision in this case is concerned, may be treated as though they were alike.

The first question to be decided in this connection is as to whether these treaties are executory, whether they are agreements between the high contracting parties to be performed in the future, and whether they should receive the sanction of the legislative branch of the Government before the question of their enforcement may be submitted to judicial tribunals. Importers' briefs cite American Express Co. v. United States, supra (wood-pulp case), as authority for holding that these treaties are self-executing. We do not think that decision is warrant for so holding. In the first place the articles of the treaties under consideration there, and upon which the determination in that case depended, were the favored-nation clauses. Much stress was laid upon the language in the favored-nation clauses which is not found in these specific agreements, to wit: "It shall immediately become common to the other party." It was there held that this language implied that it was intended the law should, and as a matter of fact did, operate ex proprio vigore. The decision in that case is, in our opinion, slight authority for holding that such treaties as are now before us would be so considered. As we read the decisions upon this point the Court of Customs Appeals
16 has extended the rule quite as far as, if not beyond, that laid down by the Federal courts in the various decisions. We are not disposed to take a position which is more liberal than that assumed by the Court of Customs Appeals. We are of the opinion that these treaties are not self-executing.

In view of the obvious purpose of Sections VII and VIII of Article I of the Constitution of the United States, the most that can be said with reference to the specific treaties here under discussion is that they were entered into with full knowledge that they should be operative only after they had received the approval of Congress.

The question as to whether the interpretation or enforcement of a treaty provision is a political question or one to be submitted to the judicial branch of the Government has been discussed by the courts from a very early period. One of the early decisions dealing with the question of how far the courts may go in enforcing the terms of a treaty is that of Foster v. Neilson. (2 Pet., 253.) Chief Justice Marshall in that opinion used the following language (p. 314):

"Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation *import a contract when either of the parties engages to perform a particular act* the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court." [Italics are ours.]

These treaties imply a contract. Of necessity they must be held to

have reference to something in the future from the time of ratification. They stipulate for the performance of acts, certain of which are to be performed outside the territory of the United States. The courts have no means of determining whether they are in
17 force and lack jurisdiction to compel the enforcement of the provisions in question except in so far as they might say the favor should be extended to the foreign power, whether or not the arrangement was reciprocal, and like favors extended to the United States.

The Constitution provides (Art. VI, clause 2) that it, the statutes, and treaties shall be the supreme law of the land.

Treaties, so far as the courts are concerned, are upon the same basis as statutes if they are such as come within the purview and jurisdiction of judicial authority. It must be borne in mind, however, that treaties are international; that the subjects provided for in treaties are numerous and entirely outside the judicial sphere. The political branch of the Government is charged with the responsibility of seeing that treaty promises are kept, and the treaty-making power is limited, apparently, in its field of negotiations only by the Constitution of the United States and the pleasure and inclination of the other high contracting parties.

The case of Taylor v. Morton (2 Curtis, 454; 23 Fed. Cas., 784) is instructive upon the question as to what is and what is not a self-executing treaty. The language of Mr. Justice Curtis in that decision furnishes a very clear rule, it seems to us, for the treatment of the cases at bar. In that case a treaty between Russia and the United States was under consideration, the terms of which, in our judgment, are similar to the terms of the treaties here in question. Judge Montgomery, in the wood-pulp cases, seems to question the applicability of the decision in Taylor v. Morton to the question arising under the most-favored-nation clauses. In our judgment, however, there can be no distinction between the case as stated by Mr. Justice Curtis in Taylor v. Morton and the specific provisions in the treaties immediately applicable to the question here under discussion. Mr. Justice Curtis said:

"We may approach this question, therefore, free from any of that anxiety respecting the preservation of our national faith
18 which can scarcely be too easily awakened or too sensibly felt. For this question, in that aspect of it, is not whether the act of Congress is consistent with the treaty but whether that is a judicial question to be here tried."

And, further:

"Is it a judicial question whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our

Government to withhold the execution of a promise contained in a treaty or to act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and the legislative departments of our Government. They belong to diplomacy and legislation, and not to the administration of existing laws."

The clause in the Russian treaty under consideration by Mr. Justice Curtis is found in Article VI of the treaty with Russia of December 18, 1832, which reads:

"No higher or other duties shall be imposed on the importation into the United States of any article the produce of manufacture of Russia; and no higher or other duties shall be imposed on the importation into the Empire of Russia of any article the produce or manufacture of the United States than are or shall be payable on the like article being the produce or manufacture of any other foreign country."

The decision in Taylor v. Morton continues:

"The truth is that this clause in the treaty is merely a contract addressing itself to the legislative power. The distinction between such treaties and those which operate as laws in courts of justice is settled in our jurisprudence."

19 Then follows the citation of Foster v. Neilson (2 Pet., 314), supra, with quotations therefrom.

It seems to us plain that the courts, not having power to abrogate a treaty or to determine whether it is in force, would not assume jurisdiction to enforce its contractural provision, some of which are enforceable only outside their jurisdiction. The courts of the United States would not assume to say to a foreign country, "Do this" or "Do that," to conform to the stipulations in a treaty made with the United States; and not having power to do so, they will not assume to direct the actions of the other contracting party, but will rather treat the questions as political, to be left to diplomacy and international negotiations.

All the treaties here in question have reciprocal provisions, hence are enforceable in their entirety in two jurisdictions.

There may be some confusion in the authorities as to whether the provisions of a treaty are executory; but as we understand the rule laid down by the decisions, there is no authority for holding that treaties which provide for the performance of certain agreements in the future are self-executing.

There is another aspect of this case with reference to these particular treaties which we desire to consider. The Constitution reads (Art. VI, clause 2):

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land; * * *."

While no distinction seems to be made in this article between the Constitution, the statutes, and the treaties, the necessity for consistent judicial interpretation has placed the Constitution superior to the statutes and the treaties, and we think that neither statute nor treaty can be enforced by the courts which is contrary to the
20 letter or spirit of the Constitution. And a specific grant of power in the Constitution, or any special designation of a subject matter which is clearly within the scope of either branch of the Government, can not be usurped or infringed upon by another branch.

Article I, section 7, clause 1, of the Constitution provides:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills."

Section 8 of the same article provides:

"The Congress shall have power:

"1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

In view of these provisions, it seems to us necessary to inquire whether the treaty-making power, in entering into these treaties, has not infringed upon the field especially reserved in the Constitution to the House of Representatives and to Congress. Our views are expressed in the language of Mr. Blaine, Secretary of State, found on page 169 of the fifth volume of Moore's International Law Digest:

"A treaty, no less than the statute law, 'must be made in conformity with the Constitution, and where a provision in either a treaty or a law is found to contravene the principles of the Constitution such provision must give way to the superior force of the Constitution, which is the organic law of the Republic, binding alike on the Government and the Nation.'"

Mr. Wharton, in his International Law Digest, Volume II, page 26, section 131a, says:

"That a treaty can not invade the constitutional prerogatives of the legislature is thus illustrated by a German author, who has given to the subject a degree of elaborate and extended exposition
21 which it has received from no other writer in our own tongue. 'Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty-making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and the Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives.'"

So we may say here that if the President and the Senate, by their power to make treaties, can, by a treaty previously entered into, in any way hamper, limit, or embarrass the House of Representatives in its legislation upon the question of revenues, or Congress within the sphere of its constitutional privilege to levy and collect duties, they may by a subsequent treaty annual and destroy the rights reserved in the Constitution to control legislation upon these specific and particular matters, and overturn the whole system of revenue laws, no matter how carefully considered or elaborately and efficiently planned.

The revenues of the United States are raised largely from the imposition of import duties. The law of which subsection 7 is a part is framed according to a policy and according to the requirements of the Government. In our opinion it was not intended that there should rest within the treaty-making branch the power to disturb or prevent the free exercise of the judgment of Congress as to the rate and amount of duties to be levied upon imports; once having been so determined, such determination can not be disturbed or set aside except with the consent of Congress. In other words, while a treaty which assumed to interfere in that way with the constitutional prerogative of Congress might be valid and enforceable as between the two nations, the courts would be unable to
22 grant relief under such a treaty. Claims arising under the provisions of a treaty, not self-executing, either from a citizen or a foreigner, would have to be made to those who alone are empowered by the Constitution to consider and adjust such claims.

Mr. Justice Curtis, in Taylor v. Morton, supra, said:

"The powers to regulate commerce and to levy duties are as expressly given as the power to declare war; and the former are as absolute and unrestrained as the latter."

The Constitution in Article I, section 8, clause 11, provides that Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

Would anyone contend that, in spite of this provision of the Constitution, the treaty-making power of the Government, the President and Senate, would have power to declare war? We think not.

How far the President and Senate are authorized to go in making self-executing treaties independently of the sanction of the House of Representatives and Congress has been discussed from the time of the first administration. One of the questions presented was as to how far a treaty could embrace commercial regulations so as to be obligatory upon the Nation and upon Congress. This question has been debated from time to time with great zeal and learning in both houses of Congress. See Story on the Constitution (vol. 2, chap. 42, and notes). The learned commentator concludes this chapter with the following observation in section 1842:

"From this supremacy of the Constitution and laws and treaties of the United States, within their constitutional scope, arises the duty

of courts of justice to declare any unconstitutional law passed by Congress or by a State legislature void. So, in like manner, the same duty arises whenever any other department of the National or State Governments exceeds its constitutional functions."

23 A very clear exposition of the question as to how far the President, with the advice and consent of the Senate, can go in making treaties which are enforceable independently of the consent of the House of Representatives and Congress is found in a report by Mr. J. R. Tucker, chairman of the Judiciary Committee of the House, Forty-ninth Congress, second session. The document is known as House Report No. 4177. See also Tucker on Constitutional Law (vol. 2, sec. 354, et seq.).

Reference is here also made to a report by Mr. Rufus Choate for the Committee on Foreign Affairs of the Senate (Senate Journal, first session, Twenty-eight Congress, page 445 et seq.) Among other things he states the following upon this subject:

"In the judgment of the committee the legislature is the department of Government by which commerce should be regulated and laws of revenue be passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress."

We conclude that subsection 7 of paragraph J of section 4, tariff act of 1913, should be enforced according to its letter—

That dutiable goods imported in vessels admitted to registration under the laws of the United States should be conceded a 5 per cent discount from the duties provided for in the other parts of the statute;

That the most-favored-nation clauses in treaties with foreign countries are not applicable to the questions at issue here, as subsection 7 does not extend any special favor to any particular country,

24 but is an offer or promise by the United States to importers, wherever residing, for the benefit of American shipping, with incidental benefits to the importer; that it is not gratuitously given in any sense of the word, but is in consideration of the necessary trouble and expense incumbent upon the shipper who selects American vessels, and the enforcement of the law does not abrogate or in any manner impair or affect the provisions of any treaty;

That the more specific commercial treaties here in question are not self-executing; they are executory; and the question of their application is a political one and not within the jurisdiction of the courts. And, besides, they can not be recognized and enforced by the courts for the reason that they are opposed to the spirit and letter of the

Constitution. The clauses in question in these treaties are merely contracts, which address themselves to the legislative power.

We therefore, as stated above, sustain the protests where the goods are imported in vessels subject to American registry, and overrule the protests where the goods are imported in vessels not subject to American registry.

There is still one other question to be considered—that is, as to what duty shall be imposed upon goods entered under the laws of 1909 for warehouse and not withdrawn until the law of 1913 went into effect. If such goods were imported in vessels not of American registry, the duty to be imposed would be that which is provided for in the appropriate sections of the law of 1913 in force at the time of withdrawal. If they were imported in American vessels, it might be thought another rule would apply, to wit, that the 5 per cent discount being in force at the time of withdrawal, said entries should be given the benefit thereof. We are of the opinion, however, that the benefit was intended to be extended only to those ships which imported goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

25 Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute, subsection 7 does not impose a duty; it grants a reduction for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act. This applies to protest 726469, which covers goods imported in a vessel admitted to registry under the laws of Great Britain and withdrawn from warehouse subsequent to October 3, 1913; and protest 726816, which covers goods imported in a vessel admitted to registry under the laws of Belgium and withdrawn from warehouse subsequent to the act of 1913. This claim made by importers is therefore overruled.

The protests here involved have been submitted upon stipulations between counsel showing the countries to which the various vessels belong, as set forth in the following schedule:

Austria-Hungary, protest 726867; Belgium, protests 726816 and 726868; Germany, protests 727395 and 727502; Great Britain, protests 726469 and 726898; Italy, protest 726470; Netherlands, protests 726808, 727693, 728560, and 729239; Norway, protest 727394; Spain, protest 726810; United States, protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757.

We therefore sustain protests 726474, 726811, 726895, 726912, 727399, 727675, and 727757, which cover goods imported in American vessels; and overrule protests 726469, 726470, 726808, 726810, 726816,

726867, 726868, 726898, 727394, 727395, 727502, 727693, 728560, and 729239, which cover goods imported in foreign vessels.

BYRON S. WAITE,
H. M. SOMERVILLE,
EUGENE G. HAY,
Board of U. S. General Appraisers.

Endorsed: United States Court of Customs Appeals. Filed May 21, 1914. Arthur B. Shelton, clerk.

26 United States Court of Customs Appeals.

THE UNITED STATES, v. SELGAS & COMPANY. } No. 1396.

Certificate of the Attorney General.

In pursuance of the act entitled "An act to amend section 195 of the act entitled 'An act to codify, revise, and amend the laws relating to the judiciary, approved March 3, 1911,'" approved August 22, 1914, I, Thomas Watt Gregory, Attorney General of the United States, do certify that the case now pending and undecided in the Court of Customs Appeals, entitled "No 1396, The United States v. Selgas & Co.," is of such importance as to render expedient its review by the Supreme Court.

Given under my hand this 29th day of Sept., 1914.

T. W. GREGORY,
Attorney General.

Filed October 2, 1914. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

27 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT, vs. SELGAS & CO., APPELLEE. } No. 1396.

The above-entitled appeal was argued by counsel and taken under advisement by the court on November 10, 11, and 12, 1914.

28 United States Court of Customs Appeals.

TUESDAY, *May 25, 1915.*

At a session of said court continued and held at the city of Washington, pursuant to adjournment, on this 25th day of May, A. D. 1915.

Present, the Honorable Robert M. Montgomery, presiding judge, and the Honorables James F. Smith, Orion M. Barber, Marion De Vries, and George E. Martin, associate judges.

The court was opened for business in due form.

No. 1346.

The M. H. Pulaski Co., Johnson & Faulkner, John Pullman & Co., appellants,

v.

The United States, appellee.

No. 1353.

R. B. Henry Co., Wiener Brothers, Lehn & Fink, W. A. Taylor & Co., J. S. Plummer & Co., Mecke & Co., J. Wile Sons & Co., appellants.

v.

The United States, appellee.

No. 1355.

J. Elliott & Co., Samstag & Hilder Brothers, appellants,

v.

The United States, appellee.

No. 1364.

Robert Muller & Co., appellant,

v.

The United States, appellee.

No. 1370.

Wood & Selick, Louis Meyers & Son, appellants,

v.

The United States, appellee.

No. 1391.

The United States, appellant,

v.

J. Wile Sons & Co., appellee.

29 No. 1392.

The United States, appellant,

v.

G. W. Faber (Inc.), appellee.

No. 1393.

The United States, appellant,

v.

Louis Meyers & Son, appellee.

No. 1394.

The United States, appellant,

v.

William Openhym & Sons, A. Wimpfheimer & Bro., appellees.

Said appeals having heretofore been brought on to be heard before the court, and due consideration thereon having been had, it is ordered:

(1) That the merchandise involved in these cases, imported in the registered vessels of the United States, is entitled to the five per cent discount as held by the Board of United States General Appraisers, whose decision relating thereto is hereby affirmed.

(2) That as to the merchandise imported in the registered vessels of the said treaty nations, both that which was imported and entered for consumption subsequent to the taking effect of the tariff act of 1913, as well as that which was brought to our ports prior thereto and entered in bond for warehousing, subsequently withdrawn for consumption and duties paid, the five per cent discount must be allowed, and with respect to such merchandise the decision of said board is hereby reversed.

(3) That the merchandise imported in vessels of our registry before the tariff act of 1913 took effect which was entered in bond for warehousing, subsequently withdrawn and entered for consumption and duties paid, is entitled to the five per cent discount thereon, and the decision of said board with respect thereto is reversed.

(4) That the merchandise from Cuba is entitled to the reduction of twenty per centum ad valorem provided by the Cuban treaty, and the further discount of five per centum ad valorem from the amount so ascertained. As to such importations the de-

No. 1395.

The United States, appellant,

v.

Park & Tilford, appellee.

No. 1396.

The United States, appellant,

v.

Selgas & Co., appellee.

No. 1399.

E. La Montagne's Sons, appellants,

v.

The United States, appellee.

No. 1410.

Cullman Brothers, E. Rosenwald & Bro., appellants,

v.

The United States, appellee.

No. 1440.

A. Lorsch & Co., Henry Glass & Co., F. L. Kraemer & Co., L. D. Bloch & Co., A. Leipzig (Inc.), A. J. Dale, appellants,

v.

The United States, appellee.

cision of said board is hereby affirmed.

And said appeals are remanded to said board for proper action in the premises.

De Vries, associate judge, dissents.

* * * * * * *

(Signed) ROBERT M. MONTGOMERY,
Presiding Judge.

30 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
SELGAS & CO., APPELLEE. } No. 1396.

For the opinion of the court in the above-entitled appeal see transcript of record in the case of R. B. Henry Co. et al., appellants, v. The United States, appellee, No. 1353.

31 United States Court of Customs Appeals.

THE UNITED STATES, APPELLANT,
vs.
SELGAS & CO., APPELLEE. } No. 1396.

I, Arthur B. Shelton, clerk of the United States Court of Customs Appeals, do hereby certify that the attached pages contain a true

and complete transcript of the record and proceedings had in said court in the above-entitled appeal as the same remain of record and on file in this office.

Witness my hand and the seal of this court this 11th day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON, *Clerk.*

32 United States of America, ss.

The President of the United States of America to the honorable the judges of the United States Court of Customs Appeals, greeting:

Being informed that there is now pending before you a suit in which The United States is appellant and Selgas & Company are appellees, No. 1396, which suit was removed into the said Court of Customs Appeals by virtue of an appeal from the Board of United States General Appraisers, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Customs Appeals and re-
33 moved into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of June, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.] JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

34 (Indorsed:) File No. 24,790. Supreme Court of the United States, No. 1046, October term, 1914. The United States vs. Selgas & Company. Writ of certiorari.

35 In the Supreme Court of the United States, October term, 1914.

THE UNITED STATES, PETITIONER,
v.
SELGAS & COMPANY. } No. 1046.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record on file in the Supreme Court shall constitute the return of the clerk of the Court of Customs Appeals to the writ of certiorari issued herein.

JNO. W. DAVIS,
Solicitor General.
RUFUS W. SPRAGUE, Jr.,
Counsel for Respondent.

JUNE 25, 1915.

Filed June 25, 1915. United States Court of Customs Appeals. Arthur B. Shelton, clerk.

36 *Return to writ.*

United States Court of Customs Appeals.

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The United States v. Selgas & Co., No. 1396, is a full, true, and complete transcript of the record and proceedings in said appeal.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States Court of Customs Appeals this twenty-sixth day of June, A. D. 1915.

[SEAL.] ARTHUR B. SHELTON,
Clerk of the United States Court of Customs Appeals.

(Stamped:) Office of the clerk Supreme Court U. S. Received June 29, 1915.

37 (Indorsed:) File No. 24,790. Supreme Court U. S., October term, 1915. Term No. 509. The United States, petitioner, vs. Selgas & Company. Writ of certiorari and return. Filed June 29, 1915.

(Indorsement on cover:) File No. 24,790. U. S. Court of Customs Appeals. Term No. 509. The United States, petitioner, vs. Selgas & Company. Petition for writ of certiorari and exhibit thereto and waiver of notice of submission. Filed June 12, 1915. File No. 24,790.

○

FILED
FEB 17 1916
JAMES D. MAHER
CLERK

FIVE PER CENT. DISCOUNT CASES.

149 162

Nos. ~~156~~ TO ~~555~~.

In the Supreme Court of the United States,

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER,

v.

THE M. H. PULASKI CO. ET AL.
SAME *v.* R. B. HENRY CO. ET AL.
SAME *v.* JAMES ELLIOTT & CO. ET AL.
SAME *v.* J. WILE SONS & CO.
SAME *v.* ROBERT MULLER & CO.
SAME *v.* WOOD & SELICK ET AL.
SAME *v.* E. LA MONTAGNE'S SONS.
SAME *v.* ALBERT LORSCH & CO. ET AL.
SAME *v.* CULLMAN BROS. ET AL.
SAME *v.* G. W. FABER, INC.
SAME *v.* LOUIS MEYERS & SON.
SAME *v.* WILLIAM OPENHYM & SONS ET AL.
SAME *v.* PARK & TILFORD.
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Supreme Court of the United States.

Nos. 496 to 509.

OCTOBER TERM, 1915.

THE UNITED STATES, Petitioner, v. THE M. H. PULASKI CO. et al., Respondents.	No. 496.
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THE UNITED STATES, Petitioner, v. PARK & TILFORD, Respondents.	No. 508.
THE UNITED STATES, Petitioner, v. SELGAS & CO., Respondents.	No. 509.

BRIEF FOR THE RESPONDENTS.

Statement of the Cases.

The classification of the cases made by the Government, the claims of the respondents in each of them, the rulings and decisions of the Board of General Appraisers and of the Court of Customs Appeals and the issues presented for determination are correctly set forth in the brief for the Government and need not be repeated by us.

The primary and paramount question, underlying all the cases, is as to the meaning of Subsection 7 of Paragraph J of Section IV of the Tariff Act of 1913.

The Government contends that it has no force or meaning and is an absolute nullity. The respondents contend that it grants by virtue of its first clause a discount of 5 per centum on all duties upon imports made in American vessels and by the proviso extends this discount to imports in the vessels of nations with which we have treaties containing reciprocal commercial agreements.

The Government further contends that even if the respondents are right in this construction of the statute, the discount may yet not be allowed on goods entered without payment of duty and warehoused prior to October 3, 1913, and not withdrawn until after that date. The respondents contend that the discount must be allowed on all goods, coming within the scope of the subsection, the importation of which was not completed prior to the date mentioned.

The facts in each case differ only as to the date of the importation, the character of the merchandise and the registration of the vessel in which

the merchandise was imported. It is, therefore, unnecessary to set forth here in detail a statement thereof, but for purposes of reference they are summarized in Appendix A annexed. The references to the record herein are to the transcript of record in causes Nos. 497, 498, 499.

SUMMARY OF POINTS.

I.

The subsection is plain and without ambiguity. By its first clause the discount is granted on goods imported in American vessels, and by the proviso, discrimination against nations with which we have reciprocal commercial agreements is precluded and so the discount is extended to imports in their vessels.

II.

Even if the treaties had not been executed by the statute they would nevertheless be self-executing.

III.

The proviso does not nullify the first clause. To so construe it is to nullify the entire subsection.

IV.

The subsection is an intelligent expression of a legislative purpose to aid American shipping without immediate disturbance of existing treaty agreements.

V.

That the purpose of the law might have been otherwise or better expressed is no reason for denying to it its plain significance.

VI.

The Act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result.

VII.

Substantial discrimination in favor of American vessels in fact results from respondents' construction.

VIII.

The subsection became effective with the Tariff Act itself.

IX.

Goods arriving in vessels of the United States or in vessels of treaty nations prior to October 4, 1913, warehoused on arrival and withdrawn from bonded warehouse on or after October 4, 1913, are entitled to the discount.

X.

If the 5 per cent. discount be allowed at all it is concededly allowed to Cuban goods.

ARGUMENT.

The primary and paramount question in this case is, what is the meaning of Subsection 7 of Paragraph J of Section IV of the Tariff Act of 1913.

The respondents contend that the subsection means what it says; the Government, that it means nothing at all.

The subsection is as follows, viz.:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The Tariff Act as an act imposing duties on imports would be in nowise impaired if this subsection were taken out of it bodily. Nor would the subsection be impaired in any wise if it were the subject of a separate enactment. Substitute the word "law" for the words "this Act" in the second line of the subsection and we have a piece of legislation complete and operative within itself. But what does it mean?

I.

The subsection is plain and without ambiguity. By its first clause the discount is granted on goods imported in American vessels, and by the proviso, discrimination against nations with which we have reciprocal commercial agreements is precluded and so the discount is extended to imports in their vessels.

The meaning of the section must be determined if possible from the words in which it is expressed and resort to extrinsic aids is permissible only in case the law is not self-explanatory.

Weber v. *Freed*, 239 U. S., 325, 330.

Dewey v. *United States*, 178 U. S., 510, 521.

Hamilton v. *Rathbone*, 175 U. S., 414, 419.

United States v. *Goldenberg*, 168 U. S., 95, 102, 103.

The law is to be considered in its entirety, the principal clause and the proviso together as one expression of legislative intent.

White v. *United States*, 191 U. S., 545, 551.

Dollar Savings Bank v. *United States*, 19 Wall, 227.

The principal clause is a plain statement of a single and simple proposition. "A discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States." This is intelligible and practicable. In determining the

duties on imports in American bottoms the schedule rates are to be discounted five per cent. We need not go outside the clause to ascertain its meaning or to find a mode of carrying it into effect. It is self-explanatory and self-executing.

But there is the proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

Here is an implication that there may be existing treaties between the United States and foreign nations, and such is the fact. There is the further implication that one or more of such treaties might be abrogated or in some manner impaired or affected by the principal clause. We must then follow the reference of the act and make inquiry as to our treaties and ascertain which of them, if any, may by any possible construction or operation of the act be abrogated, impaired or affected.

We find a number of such treaties. The Treaty of Commerce and Navigation of 1871 with Italy may for the present purpose be taken as a type of the treaties except the British, French and a few others stated in the Government brief (pp. 4, 6, 7).

In the Italian treaty there is one article, and only one, which would by any possible construction be abrogated, impaired or affected by the act. This is Article V and is as follows:

> "The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; *that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected,*

> *whether the importation be made in vessels of the one country or of the other;* and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy in its own vessels, may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other."

How can this article of the treaty be abrogated, impaired or affected by the act? The Constitution, Article VI, provides:

> "This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

In virtue of this provision the treaty-making power of the United States is a law-making power, as much so as the Congress. Each must keep within the bounds of its authority, and doing so the acts of each are of equal rank and dignity. As this Court said in *Whitney* v. *Robertson,* 124 U. S., 190, 194:

> "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other."

See, also, *United States* v. *Lee Yen Tai,* 185 U. S., 213.

In determining what is the law in any given

case, where as here, a treaty and an act of Congress are involved, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing" (*Whitney* v. *Robertson, supra*).

Although the Government contended below that this treaty was self-executing (*infra*, p. 14), it now says that it was merely an executory promise. To avoid digression here we will postpone the discussion of the self-executing or executory character of the treaties to a later stage of the argument (*infra*, II, p. 14).

But even if the treaty were executory, which we do not concede, the fact remains that it was executed by this Government by the very statute in question. That asserted the obligation of the Government to admit imports in Italian vessels without payment of other or higher duties upon the cargoes than were levied and collected upon importations made in vessels of the United States.

We have, then, a treaty stipulation with Italy that no other or higher duties shall be levied or collected upon imports in Italian vessels than upon imports in vessels of the United States, and we have an act of Congress, later in date, prescribing a schedule of duties upon imports generally, with a discount, however, of five per centum on all duties upon imports in American vessels. This discount is not in terms extended to Italian vessels, and the law being construed, and as a later law it well might be, as limiting the discount to the cargoes of American vessels,

the treaty stipulation would be affected, impaired and indeed abrogated, for the duties thenceforth imposed upon the cargoes of Italian vessels would be other and higher than those imposed upon the cargoes of American vessels. And so to prevent this effect and operation of the act, the proviso was added that "nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." The act was not to be construed as a later act repugnant to the treaty stipulation, but both were to stand as if the treaty were a part of the act or of a later date. Congress had power to abrogate the treaty by the act in question, (*United States* v. *Lee Yen Tai, supra*), but declined to do so, and in terms said that the treaty stipulation and the act should stand together. The treaty stipulation was by Congress in effect made a part of the act of equal efficacy with the provision for discount.

The resulting law of the case is that the schedule of duties prescribed by the tariff act is to be discounted five per cent. on imports in American bottoms and no other or higher duties are to be levied upon imports in the vessels of Italy than in those of the United States.

There is no question here, it is to be observed, of conflict between the legislative power and the treaty-making power of the United States, *for the agreement made by the treaty-making power has the express sanction of the legislative power.*

By express sanction of the legislative power the treaty-making power agrees that the duties upon imports in Italian vessels shall be the same as upon imports in American vessels. And whatever the nationality of the vessel, Italian or American,

the duties to be levied and collected are those prescribed for imports in American vessels by the act imposing the duties, for the treaty itself prescribes no duties.

Keeping within the terms of the act and of the treaty stipulation to which we are referred by the act, no other conclusion is possible. The meaning of the entire subsection becomes as evident as that of the principal clause: a discount of five per cent. to American vessels, says the principal clause; and the same to the vessels of Italy, says the proviso. And there is no difficulty in putting the law into actual operation. Collect the same duties upon imports in the vessels of both nations, viz.: the duties prescribed by the schedules, less five per cent.

If we had such a treaty only with Italy, there would be no possible basis for different constructions of the act and no controversy concerning it would ever have arisen. The effect of the act would be the same in such case as if the proviso read, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and Italy." The discount would be plainly intended as to importations in vessels of both nations.

How can the fact that we have treaties containing the same reciprocal commercial provision with other nations as well as with Italy affect the construction of the act? The proviso applies to "*any treaty* concluded between the United States and *any foreign nation.*" The number of such treaty nations would not alter the terms of the act and so could not alter its construction. True it is, that if we had such a treaty with every nation, the re-

sult of the operation of the law would be no discrimination in favor of American shipping and we may well presume that Congress in that case would not enact such a law as this, unless it also contemplated an early change in our treaty relations.

But the fact is admittedly that the reciprocal commercial provisions of our treaties with foreign nations are far from being comprehensive of all our foreign commerce, and Congress has seen proper, in the circumstances as they are, to enact this law, and its construction and legal effect are to be determined by the words employed, and are necessarily the same whether the terms "any treaty concluded between the United States and any foreign nation," are comprehensive of only one treaty or of more.

If a duty is imposed by the act, then as to imports in American vessels the discount shall be allowed, and the "shall" here is equivalent to "must." The subsection by its terms admits of no postponement beyond the taking effect of the Tariff Act.

It became effective on the day following the passage of the act, because (a) Paragraph U of Section IV so expressly provides, and (b) the clause itself refers to "all duties imposed by this Act" which, by the opening sentence of the first section of the act are imposed "on and after the day following the passage of this Act, except as otherwise specially provided for in this Act." There are four provisions in the act which specially provide that they shall take effect at some other time (Pars. 177, 310, 650 and 651 of Section 1), but the subsection here in question is not one of them.

In all the cases now before the Court, the duties were "imposed by this Act" of October 3, 1913. Therefore, the subsection referred to applies to them.

II.

Even if the treaties had not been executed by the statute they would nevertheless be self-executing.

It is immaterial whether or not the shipping clauses of the various treaties here concerned operate *ex proprio vigore*, since the very statute under consideration expressly saves the treaties from repeal and gives them the force and effect of laws.

That the stipulations of all the treaties involved are self-executing and in force, was not only not disputed by the Government in the Court of Customs Appeals, but was distinctly contended for. Indeed as the Court below expressly points out:

> "At the outset the Government unqualifiedly concedes that the said reciprocal commercial provisions are effective and in force as the law of the land * * *" (R., p. 47).

This was done in support of its position that Subsection 7 was entirely inoperative. It was said by the Assistant Attorney General (p. 31 of the Brief in that Court):

> "If the departments of our Government which are entrusted with the foreign intercourse of the nation have recognized the existence and validity of these treaties, and if Congress has acted and has forbidden any construction of Subsection 7 which would abrogate, impair or affect them, it would be an anomaly to have an opposite construction maintained in the Courts. It would be monstrous for a Court to assert that the treaties were so inoperative that no attention need be paid to their requirements."

The Government now takes a position in its

brief before this Court which is repugnant to its former unqualified concession alluded to by the Court below. It begins by saying that a definition of the treaties is in this instance "after all immaterial" (Brief, 36). It then proceeds to argue that "the treaties under discussion are in fact not self-executing but merely executory promises binding upon the legislative branch of the Government" (Brief, 37). We quite agree that a discussion of this branch of the case is "at the cost of digression" (Brief, 36), but the Government's change of attitude would seem to require it.

The leading example cited to support the contention that "action and inaction alike rest with the *legislative branch*" (Brief, 39), is, when analyzed, unconvincing. The British treaty of 1815 was concluded July 3d. At that time there was not only, as the Government points out (Brief, 39), "a statute imposing an additional duty of ten per cent. on all importations in foreign vessels," but in addition to this, Congress, beginning in 1809, had passed a series of non-intercourse acts in retaliation for British edicts which were held to violate the neutral commerce of the United States.

No such parallel exists in the case at bar by reason of treaties and laws now in force. As the Solicitor General points out, there is no such discrimination in force against merchandise imported in foreign bottoms. (Brief, pp. 69 *et seq.*, 109.) The reason for the retention of Subsection 1 of Paragraph J of the existing law referred to by him is to prevent discrimination by foreign nations against our shipping, and it has been very effective.

In the face, then, of the drastic laws in force when the British Treaty of 1815 was proclaimed, the question was raised in Congress as to whether their legislative repeal was essential. The learned Solicitor General says, "Congress perceived that the maintenance of this discrimination was inconsistent with the treaty and that the treaty did not work of itself a repeal of the statute." (Brief, 39). Let us see:

When Congress assembled in December, 1815, the House passed a bill following closely the language of the treaty (14th Annals of Congress, 1st Session, p. 674). The Senate in the meantime passed a bill based upon quite a different theory of the necessities of the situation. The controversy was thus outlined on the floor of the Senate by Senator James Barbour, Chairman of the Committee on Foreign Relations and afterwards Secretary of War and Minister to England (*Ibid.*, p. 46).

> "A bill, brought in by the Committee on Foreign Relations, passed the Senate unanimously, declaring that all laws in opposition to the convention between the United States and Great Britain, concluded on the 3d July last, should be held as null and void. The principle on which this body acted, was, that the treaty, upon the exchange of its ratification, did, of itself, repeal any commercial regulation, incompatible with its provisions, existing in our municipal code; it being by us believed at the time that such a bill was not necessary, but by a *declaratory act* it was supposed all doubts and difficulties, should any exist, might be removed. This bill is sent to the House of Representatives, who, without acting thereon, send us the one under consideration, but differing materially from ours. * * *
>
> "Is the legislative sanction necessary to

give it effect? I answer in the negative. Why? Because, by the second clause of the sixth article of the Constitution, it is declared that all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land. If this clause means anything, it is conclusive of the question.

* * * * * *

"The President shall have power, by and with the advice and consent of the Senate, to make treaties, which treaties shall be the supreme law of the land. I seek to gain no surreptitious advantage from the word supreme, because I frankly admit that it is used in the Constitution, in relation to the laws and constitutions of the States; but I appeal to it merely to ascertain the high authority intended to be imparted by the framers of the Constitution to a ratified treaty. It is classed in point of dignity with the laws of the United States. We ask for no superiority, but equality; and as the last law made annuls a former one, where they conflict, so we contend that a subsequent treaty, as in the present case, revokes a former law in opposition thereto." (*Ibid.*, pp. 49-50.)

On February 27, 1816, Mr. King from the Committee on Foreign Relations submitted a conference report pointing out that the conferees of the House made this objection, among others, to the bill passed by the Senate:

"That by the addition of the word 'declared' to the usual formula, instead of a bill of positive enactment, it assumes the form of a declaratory law."

In answer to this objection the report goes on to say:

"The conferees of the Senate do not contest, but admitted the doctrine that of treaties

made in pursuance of the Constitution some may not and that others may call for legislative provisions to secure their execution, which provision Congress, in all such cases, is bound to make. But they did contend that the convention under consideration requires no such legislative provisions, because it does no more than suspend the alien disability of British subjects in commercial affairs in return for the like suspension in favor of American citizens; that such matter of alien disability falls within the peculiar province of the treaty power to adjust; that it can not be securely adjusted in any other way, and that a treaty duly made and adjusting the same is conclusive, and by its own authority suspends or removes antecedent laws that are contrary to its provisions.

"*That even a declaratory law to this effect is matter of mere expediency, adding nothing to the efficacy of the treaty,* and serving only to remove doubts wherever they exist.

"The conferees of the Senate thereupon insisted on retaining the word 'declared' in addition to the usual formula of enactment, because it imparts to the bill passed by the Senate the character of a declaratory law, *a quality without which any law would, in this case, be inadmissible.*

"A law that declares to be of no force or effect so much of the laws as are contrary to the provisions of the convention *recognizes the existence and authority* of that convention; the date and limitations of which must ascertain the commencement and duration of the law, while its stipulations place the people of the two nations on a footing of commercial equality by the abolition of discriminating duties on both sides" (Reports of Committee on Foreign Relations, 1789 to 1901, Vol. 8, p. 25). [Italics ours.]

Accordingly the preamble of the Act of March

1, 1816 (3 Stat., 255, c. 22) contains this significant language:

> "Be it enacted and *declared* by the Senate and House of Representatives of the United States of America, in Congress assembled," etc. [Italics ours.]

It appears from this review that the Act of March 1st, 1816, in the face of the precisely formulated House objection, was after all a declaratory law adopted as a "matter of mere expediency, adding nothing to the efficacy of the treaty." The citations from Crandall and Butler (Government Brief, p. 41), are in no way inconsistent with this view.

In 1898 the executive branch of our Government, although there was no executing act of Congress, held the favored nation articles of the Swiss Treaty of 1850 to be self-executing for the purpose of securing to Swiss cordials the same lower rates guaranteed to French cordials by reciprocal agreement, it being held that the absence of certain language of interpretation in the Swiss treaty was intentional and carved out an exception to our usual rule (*Bartram* v. *Robertson,* 122 U. S., 116) that concessions based on valuable consideration do not constitute an invasion of the favored nation principle (see Treasury Decision 20386, and Foreign Relations of the United States, 1899, p. 740 *et seq.*).

We shall see that long prior to 1898 the treaties saved by a proviso in the Tariff Act of 1842 (5 Stat., 560), were recognized by President Polk and the Treasury Department to be self-executing (*infra,* pp. 39, 40).

The view that treaty provisions are in character purely promissory and are executory contracts whose fulfillment is addressed solely to Con-

gress has been repeatedly disavowed by this Court. In the very case relied upon by the Government (Brief, 38), this Court pointed out that while a treaty is in itself a contract between two nations, *"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land."*

It is true that in *Foster & Elam* v. *Neilson*, 2 Pet., 253, the phrase in the 8th Article of the Treaty with Spain in 1819, "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, etc., *shall be ratified and confirmed,"* was held to be executory, but it is also true that a contrary conclusion was reached in the subsequent case of *United States* v. *Percheman*, 7 Pet., 51, 89, where, Chief Justice Marshall again writing the opinion, it was held that this same article of the same treaty was not executory but operated *ex proprio vigore:*

> *"Although the words 'shall be ratified and confirmed', are properly the words of contract, stipulating for some future legislative act; they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.*
>
> "In the case of *Foster* v. *Elam* [*Neilson*], 2 Pet., 253, this court considered these words as importing contract. The Spanish part of the treaty was not then brought to our view, and we then supposed that there was no variance between them. We did not suppose that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. *Had this circum-*

> *stance been known, we believe it would have produced the construction which we now give to the article.*" [Italics ours.]

So the words "shall be ratified and confirmed" in this later case were held to be self-executing and to operate, in the language of the Court, "by force of the instrument itself."

In *United States* v. *Schooner Peggy,* 1 Cranch., 103, Article 4 of the Treaty with France, 1800, was held to be self-executing. In *Ware, Administrator of Jones* v. *Hylton et al.,* 3 Dallas, 199, Article 4 of the British Treaty of 1783 was held to operate *ex proprio vigore.* See also *Hauenstein* v. *Lynham,* 100 U. S., 483, construing the 5th Article of the Swiss Treaty of 1850; *United States* v. *43 Gallons of Whiskey,* 93 U. S., 188, construing an Indian Treaty of 1863; *Tucker* v. *Alexandroff,* 183 U. S., 424, 429, construing Articles 8 and 9 of the Russian Treaty of 1832.

As to *Oldfield* v. *Marriott,* 10 How., 146, we think the position of the learned Solicitor General (Brief, p. 43) is sufficiently demonstrated to be unsound by the following language of the opinion of the Court of Customs Appeals (Rec., p. 84):

> "In this opinion it is true that the court did not allude to the question of whether any of the treaties were or were not self-executing, but it is entirely clear that they were assumed to be so, and, considering the length and exhaustiveness of the opinion, we cannot for a moment believe that the court overlooked this question. It must be regarded not only as an approval of the authority of the treaty-making power to negotiate the treaties here under consideration but *also as an authority that such treaties and the stipulations thereof before us are self-executing.*" [Italics ours.]

In *Geofroy* v. *Riggs*, 133 U. S., 258, 267, it was held that the treaty power as expressed in the Constitution was unlimited except by the restraints found in that instrument itself. The Court said:

> *"It would not be contended that it extends so far as to authorize what the Constitution forbids,* or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S., 525, 541. *But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."* [Italics ours.]

Rainey v. *United States*, 232 U. S., 310, 316, cited by the Government (Brief, p. 43), only reiterates the familiar principle that when a treaty is inconsistent with a subsequent act of Congress the latter will prevail, this Court citing with approval the language of the Court below:

> "Treaties are contracts between nations and *by the Constitution are made the law of the land.* But the Constitution does not declare that the *law so established* shall never be altered or repealed by Congress. Good faith toward the other contracting nation might require Congress to refrain from making any change, but if it does act, its enactment becomes the controlling law in this country. The other nation may have ground for complaint, but every person is bound to obey the law. And as a corollary it follows that no person acquires any vested right to the continued operation of a treaty." [Italics ours.]

The implication that treaties *until* altered or re-

pealed are the law of the land is unmistakable. *Taylor* v. *Morton*, 2 Curtis, 454, is authority only for the proposition that a subsequent law repeals an antecedent treaty, as the opinion below demonstrates (Rec., p. 80), and it is in this connection that this case is cited with approval by this Court in *Rainey* v. *United States*, *supra*.

It is clear from the foregoing that the treaties in question are self-executing. Each of them is a part of the municipal law of the land, in that they severally confer rights upon individuals which, in accordance with the established doctrine of this Court, may be judicially enforced. Duties are paid by private citizens or subjects and the clauses in question operate directly upon their rights. They are therefore directly in the line of municipal law fixing individual rights.

Head Money Cases, 112 U. S., 580, 598.
De Lima v. *Bidwell*, 182 U. S., 1, 195.

III.

The proviso does not nullify the first clause. To so construe it is to nullify the entire subsection.

The Government refuses to accept the subsection as meaning what it says and insists that it is an absolute nullity. That Congress had power to deal with the subject matter, that it had power to do exactly what we say was done—that is, grant the discount to imports in vessels of the United States and of nations with which the United States had

reciprocal commercial treaty agreements, is not denied.

The contention is that Congress has so done it as not to do it. "The proviso" (Brief, pp. 46, 47), "was not intended to enlarge the operation of the discount clause, but on the contrary to restrict it * * *. This purports to be merely a rule of construction, and the courts are directed by it to lay the main clause of the subsection alongside the treaties and give to the main clause no interpretation which is in conflict with the promises of the latter." The conclusion is reached that the discount clause shall operate if it does not contravene any treaty and shall not operate if it does. This makes of the proviso a condition as to the taking effect of the main clause.

Such was clearly the nature of the proviso in *Austin* v. *United States*, 155 U. S., 417. The legal representatives of Austin were by the act there in question authorized to sue upon certain demands in the Court of Claims, provided it be shown that neither he nor any of his surviving representatives were disloyal during the war. Here was a fact to be determined which was appropriately referred, with the demands themselves, to the Court of Claims for adjudication.

We have no such case here. That there were treaties which might be abrogated or impaired by the main clause standing alone was known to both houses of Congress and because of this the proviso was enacted. The main clause was adhered to, but it was provided that it should be so construed as not to impair the treaties. The effect of one law upon another, and especially in case of repugnance between the two, is a matter of statutory construction and is always dealt with under that head; and one fixed

rule of construction is that in case of repugnance between two statutes, the later will be held to have repealed or abrogated the earlier law. Apply this rule of construction, that is, so construe the subsection as to make it a later law repugnant to the treaties, and the treaties would be abrogated. To prevent this effect the proviso was enacted. The subsection is not to be so construed as to abrogate the treaties, but the treaties and the subsection are to stand together unaffected by any rule of construction. This gives effect to the subsection as a whole. The Government's contention destroys it in its entirety. In the case of *Brushaber* v. *U. P. R. R. Co.*, decided January 24th, 1916, this Court rejected a proposed construction of the Constitution because, "it clearly results that the proposition and the contentions under it, if acceded to, would cause one provision of the Constitution to destroy another."

An act of Congress will not be construed as giving a right and taking it away at one and the same instant.

McLean v. *United States*, 226 U. S., 374.

Cases are cited as to the functions a proviso may perform. In truth these are various, and in each case to be determined by what is there intended.

In *Georgia R. & B. Co.* v. *Smith*, 128 U. S., 174, 181, the Court said:

> "The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term

'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In *Interstate Commerce Commission* v. *Baird*, 194 U. S., 25, 36, Mr. Justice Day, speaking for the Court, said:

> "It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation (citing cases). It is apparent that this proviso was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before."

A rational interpretation will be given to a statute and a proviso, and not one by which the statute will, through the proviso, destroy itself.

> *Adams Express Co.* v. *Croninger*, 226 U. S., 491.
>
> *United States* v. *Mille Lac Chippewas*, 229 U. S., 498.

In the present case the proviso was not a condition upon which the law was to take effect. The

conditions were all known and needed not to be ascertained by any tribunal. And it was in recognition of the conditions and to prevent the abrogation abruptly and rudely of the treaty agreements that the proviso was introduced extending the discount to treaty nation vessels. This left the door open to the abrogation of the treaties or of any of them in due, orderly and courteous course of international procedure. The construction contended for by the Government does not fulfil any of the recognized functions of a proviso; it is not one of restriction, limitation, explanation, interpretation, qualification, enlargement or condition, but simply one of annihilation. The proviso kills the main clause and dies with its victim.

IV.

The subsection is an intelligent expression of a legislative purpose to aid American shipping without immediate disturbance of existing treaty agreements.

The provision as it stands and considered with reference to its own terms, has a meaning and bears a sensible construction. It is not a meaningless or contradictory jumble of words, as might be inferred is the view of the Government from some of the cases it cites (Brief, p. 79). In *United States* v. *Cantril*, 4 Cranch., 167, the statute, *by its terms*, defined as a forgery or counterfeit, a "bill or note issued by order of the president, directors and company of the Bank of the United States, and signed by the president, and countersigned by the cashier thereof." Such a note or bill was genuine and could not be counterfeit. What is quoted (Brief, p. 79) from *City of Mobile* v. *Eslava*, 16

Peters, 234, 247, is put simply by way of illustration. Manifestly an act vesting title to the same property in hostile claimants would be a nullity, by its own terms. But, says Justice McLean, "Exceptionable and involved as the language of this statute may be, it is not obnoxious to this objection," and he further observed that "however obscure some points of the act may be, its provisions are consistent." So he construed the Act to uphold it. *In re Hendricks*, 60 Kansas, 796, is clearly distinguishable. A county court was created by the act and a judge of the court was to be appointed by the governor. The act by its terms was to be effective from its date and also not effective until approved by the voters at the next general election. The judge was to be appointed within twenty days from the date of the act and again was not to be appointed until after the approval of the act by the voters. In *Farmers' Bank* v. *Hale*, 59 N. Y., 53, the act declared its true purpose to be to put state banks upon an equality, in the matter of usury, with national banks, and yet prescribed an entirely different penalty for taking usurious interest. In *International Harvester Company* v. *Kentucky*, 234 U. S., 216, the uncertainty which avoided the act inhered in its terms, which were nothing more or less, Justice Holmes said, "than an illusory form of words."

The actual contention of the Government is better illustrated by its reference to the case of *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197, 254. It quotes Mr. Justice Harlan as saying with reference to a certain construction of the Interstate Commerce Act that if the Act had been plainly expressed to that effect:

"No one would expect such a bill to pass an American Congress. If not, we should declare that Congress ever intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted."

There is an obvious mistake in the report of this opinion, which the Solicitor General suggests should be corrected by substituting "never" for "ever"; we think the correction should be made by inserting the word "not" between "should" and "declare," as is done in 16 Supreme Court Reporter, 666, 688."

However this may be, the quotation is from a dissenting opinion, and in criticism of the majority opinion, and had reference to the very construction which the majority placed on the act, the construction which Mr. Justice Harlan contended made the act a very impolitic and unwise one. The case is then not an authority for the proposition that a statute is to be held to be no statute at all on the mere assumption that "no one would expect such a bill to pass an American Congress."

The suggestion that the statute is absurd is but a phase of the contention that it is impolitic and unwise. It is certainly plain and intelligible English and is not self-contradictory, nor even contradictory of what is said to be its purpose. The suggested absurdity of the statute is not in what it does, but in what it failed to do. Congress desired to do something for American shipping, but could not do as much as it desired, and so we are to infer it did nothing, although it plainly intended and attempted to do something. Is not the absurdity, using the word in its legal sense, in the argument, rather than in the statute?

Dealing with such a question in *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S., 438, 451, the Court said:

> "What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation, the contradiction of the reason which grows out of the subject matter of the legislation and the purpose of the legislators. But all legislation is not simple nor its consequences obvious or to be controlled, even if obvious. Whether there should be any legislation at all and its extent and form may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted but accepted as inevitable—accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce. *United States* v. *Fisher*, 2 Cranch., 358, 389. Therefore the sound rule expressed in *Sturgis* v. *Crowninshield*, 4 Wheat., 202: 'It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other * * * and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But, if in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disre-

garded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.'"

There is in the statute under consideration no such contradiction or absurdity. It does not in its operation contradict "the reason which grows out of the subject matter of the legislation and the purpose of the legislators." The statute is responsive to that reason and in aid of that purpose. Discrimination in favor of American shipping is the reason of the legislation and the purpose of the legislators. A discount upon duties is the method employed. Not everything can be immediately accomplished without an instant and rude abrogation of treaties, but treaties may be abrogated in proper manner and time, and until then their provisions are to be observed. And if it be granted—what is for legislative and not for judicial determination—that discrimination in favor of American shipping is a wise policy, this statute is not an absurd measure for the inauguration of such a policy.

The Solicitor General (Brief, p. 33), introducing his argument that the addition of the proviso resulted in an *impasse*, quotes from the language of Mr. Justice Holmes, in *U. S.* v. *Plowman*, 216 U. S., 372, 375, as follows:

"* * * It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective."

But the *Plowman* case is an authority directly contrary to the Government's contention, as appears by the quotation of the words immediately preceding and following those quoted by the Solicitor General. In that case the Court was dismissing a suggestion that a qualification inserted into a certain act made it, or was intended to make it, ineffective, which is shown by the following language of Mr. Justice Holmes:

> *"It is said that such a construction empties the statute of all its use, because if the land is known to be valuable for minerals a mining claim to it will be located, only the owners of which can cut the timber, whereas the statute gives the right to all residents. If that were true, courts still would be bound by the explicit and unmistakable words.* It is not unknown, where opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective. *But the objection is stated too strongly.* As pointed out at the argument, in 1878 probably there was a great deal of mineral land still unexplored on which claims had not been located, not to speak of mere exceptional cases in which the act would apply." (Italics ours.)

This answers the entire argument in the present case. The Government's argument is that the statute by the proviso was emptied of all its use, that the proviso was a qualification inserted into the act that was "hoped to make it ineffective." But to empty it of its use is not to empty it of its meaning, and to make it ineffective of its assumed purpose is not to make it void. We still are "bound by the explicit and unmistakable words."

We may concede without cavil that the policy of the law was discrimination in favor of Amer-

ican shipping, and further that this policy would be best promoted by making the field of discrimination as wide as possible—against the world if you please—and that as the field is restricted the resulting benefit of discrimination is diminished. But all this goes to the usefulness of the Act and not to its meaning or validity.

The Government's interpretation of the law is not interpretation at all, but is frankly nullification, and that because of the assumed unwisdom of the Act.

In his brief supporting the petition for certiorari, the Solicitor General says (p. 12):

> "Congress in what seem unmistakable terms, and for a definite purpose, confined the discount to American bottoms. It cannot be supposed that it intended at the next moment to destroy the entire economic and maritime effect of this discrimination by granting a like privilege to practically all the great trading nations of the world."

And yet in his present brief he quotes from Mr. Payne's speech on the conference report to show that precisely this was done (Brief, p. 32):

> "They had a provision in the bill of a discount of 5 per cent. duty on goods brought in in American ships. Well, I told the House I thought that might be a good provision, but that would not work, because it abrogated all the treaties. That went in, it went over to the Senate, and they considered it and then struck it out. The conferees have agreed to it with a proviso that absolutely destroys the force of it. They provided that it shall not abrogate or impair any treaty. Now you see it and now you do not see it."

Mr. Payne was speaking not as a lawyer, but as

a law maker. The proviso in his opinion emptied the main clause of its use. Like the Solicitor General, Mr. Payne overstated the effect of the proviso. The proviso diminished the use of the main clause, but did not exhaust it. As a whole the subsection declared a new policy, one of discrimination, as against one of reciprocity, the new policy not being given full scope at once because it would be discourteous, to say the least, to abrogate our treaties without notice to the other nations interested. The declared policy, if persisted in, involved the abrogation of the reciprocal commercial agreements at some time and to some extent, but it need not be at once nor to the full extent. The inconsistency, "the now you see it and now you do not see it," arises on the assumption only that the treaties were none of them ever to be changed, and that there was nothing for the subsection to operate on. Considered as a beginning, the subsection is not a vain or a foolish thing. It stands there to become by force of its own terms more and more effective as changes in treaty agreements are made, which may be either by the treaty-making power or by act of Congress.

Of the argument of the Government in this case, it may be said, as the Court said of the argument for plaintiff-in-error in *Unity* v. *Burrage,* 103 U. S., 447, 456, "This seems to be an attempt to overturn by argument and inference a deliberate enactment of the legislature, and erase it bodily from the statute book," while it is the duty of the Court "if possible, to give it effect, *ut res magis valeat quam pereat.*"

It is not permitted under any rule of statutory construction to say that the proviso was a stroke of legislative *finesse,* designed by the Senate to nullify the section as formulated by the House, under pretense of merely qualifying it. And no more

will it be permitted to say that the House under pretense of qualifying its favor to American shipping, intended to withdraw it altogether. Nothing savoring of fraud or farce may be imputed to either House. Nor can we say that here is a mere confusion of words, tumbled together, formless and void, by some blunder or accident of the composing room, for the words are marshalled in sensible order and express a purpose easily understood and as easily made effective, whether the purpose be approved or disapproved. As this Court said in *McLean* v. *United States*, 226 U. S., 374, 383,

> "To decide otherwise is to say that Congress gave a right and took it away at one and the same instant, or, in some confusion of mind, intended to withhold it by using the aptest word to confer it."

The argument against the law is not that it is unintelligible, but that it is unwise; not that it is impracticable, but that it is impolitic. To give effect to such an argument in the courts is not an exercise of the power of interpretation, but of the power of veto. This Court has always declined to avoid an act of legislation upon any suggestion as to the motives of legislators or of the unwisdom or impolicy of the act. Answering the argument assailing an act of Congress in the recent case of *Weber* v. *Freed*, 239 U. S., 325, 330, the Court said, that it "plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised." And it infringes just as much upon the plenary power of Congress to determine the validity of its enactments with reference to assumptions as to their wisdom or policy. "Whether an Act of Congress be more or less politic or wise," said the Court in *United States* v.

U. P. R. R. Co., 91 U. S., 72, "it is not our province to determine."

In *United States* v. *Goldenberg*, 168 U. S., 95, 102, the Court said:

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

To conclude that this subsection has no force whatever, that the law is the same whether it is in or out, is to deny to Congress either an honest purpose in making the enactment, or a knowledge of the meaning of words and of the rules of grammar.

In *Dewey* v. *United States*, 178 U. S., 510, 521, the Court said:

> "This court has nothing to do with questions of mere policy that may be supposed to underlie the action of Congress. What is termed the policy of the Government in reference to any particular subject of legislation, this court has said, 'is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the in-

terpretation of statutes.' *Hadden* v. *The Collector*, 5 Wall., 107, 111. Our province is to declare what the law is, and not, under the guise of interpretation or under the influence of what may be surmised to be the policy of the Government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress has not enacted as such."

V.

That the purpose of the law might have been otherwise or better expressed is no reason for denying to it its plain significance.

The Solicitor General employs his facile pen (Brief, p. 55), to draft the subsection in the form *he* would use to express the only meaning it can have. We concede the superiority of his composition. But what does it prove? Nothing to the present purpose. A statute is not to be nullified because an able lawyer and accomplished scholar can express it in better English. It remains true that the only meaning of which the subsection is capable is that so clearly expressed in the two drafts submitted by the Solicitor General. His own argument proves this. It is that or nothing.

Nor is it significant that in other statutes, in which there are provisos against the impairment of treaties, somewhat different language is used. No two persons, left to themselves, would express the same meaning in the same way. The Solicitor General himself gives an example of the same meaning expressed in two ways by one person.

But the terms of this proviso are not new to our legislation. The phraseology resorted to by Con-

gress in its evident purpose from time to time to save treaty rights has not been uniform, but the intent to save them has been always manifest. Beginning with the Tariff Act of March 27, 1804, the following forms of expression have been employed by Congress to effectuate its purpose.

The Act of March 27, 1804, providing for a discriminatory duty of 10 per cent. on goods imported in ships or vessels not of the United States, contained the following proviso:

> "Provided however, that nothing in this act shall be so construed as to contravene any provision of the treaty or conventions concluded between the United States of America and the French Republic, on the thirtieth day of April, one thousand eight hundred and three." (2 Stat., 299, 300, Chap. lvii, Sec. 6.)

The action of Congress betrays at this early period a nice concern for our treaty obligations and a clear intent that, notwithstanding the provision in the Act of 1804, French and Spanish vessels laden with the cargoes of the kind mentioned in the treaty should continue to enjoy the benefits guaranteed by it—just as we here allege, that by enacting Subsection 7 Congress in its proviso secured to treaty nations their treaty benefits.

The form of words employed in adherence to this policy has not always been the same—indeed it has varied a good deal, but frequently we find language similar to that with which we are here concerned. Thus, in Section 3 of the Act of February 5, 1816 (which secured the continuance of discriminating duties), occurs:

> "And be it further enacted, That nothing in this act contained shall be so construed as to

> contravene any provision of any commercial treaty, or convention, concluded between the United States and any foreign power or state; nor so as to impair, or in any wise affect the provisions of the act," [of March 3, 1815, repealing discriminating duties in certain cases]. (3 Stat., 253, Chap. x, Sec. 3.)

Section 6, Act of April 27, 1816, continuing certain bounties, advances and drawbacks, contained the following proviso:

> *"Provided always,* That this provision shall not be deemed in anywise to impair any rights and privileges, which have been, or may be acquired by any foreign nation, under the laws and treaties of the United States, relative to the duty of tonnage on vessels." (3 Stat., 314, Chap. cvii, Sec. 6.)

In the Act of January 14, 1817, in relation to tonnage duties, we find this proviso:

> "Provided always, That nothing in this act contained shall be deemed in any wise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels." (3 Stat., 344, Chap. iii, Sec. 1.)

The Tariff Act of August 30, 1842, Section 8, Paragraph 5, refers to brandy, wines, etc., with the proviso:

> *"Provided,* That nothing herein contained shall be construed or permitted to operate so as to interfere with subsisting treaties with foreign nations." (5 Stat., 560, Chap. cclxx, Sec. 8.)

Without further legislation, or even the suggestion that further legislation was necessary, this language was given effect, as shown by President Polk's first message December 2, 1845:

"Under the eighth section of the Tariff Act of the 30th of August, 1842, a duty of 15 cents per gallon was imposed on port wine in casks, while on the red wines of several other countries, when imported in casks, a duty of only 6 cents per gallon was imposed. This discrimination, so far as regarded the port wine of Portugal, was deemed a violation of our treaty with that power, which provides that—

> 'No higher or other duties shall be imposed on the importation into the United States of America of any article the growth, produce, or manufacture of the Kingdom and possessions of Portugal than such as are or shall be payable on the like article being the growth, produce, or manufacture of any other foreign country.'

"Accordingly, to give effect to the treaty as well as to the intention of Congress, *expressed in a proviso* (italics ours) to the Tariff Act itself, that nothing therein contained should be so construed as to interfere with subsisting treaties with foreign nations, a Treasury circular was issued on the 16th of July, 1844, which, among other things, declared the duty on the port wine of Portugal, in casks, under the existing laws and treaty to be 6 cents per gallon, and directed that the excess of duties which had been collected on such wine should be refunded" (Messages and Papers of the Presidents, Vol. IV, pp. 400-1).

Here we have a definite recognition by the department of the Government charged with the administration of the laws that rights in an antecedent treaty expressly saved from destruction *by a proviso* of a subsequent tariff act must be given full force and effect without further action by the legislative branch of the Government.

That the Solicitor General is driven by his contention into a position frankly at war with this precedent, established over seventy years ago, is shown by a reference to page 81 of his brief. He there *assumes* that a precisely analogous case, based on the Russian Treaty of 1832, and the Tariff Act of 1861 would have produced "a legislative equipoise" or a nullity.

In Section 15 of the Act of July 14, 1862, laying certain additional tonnage taxes, the following proviso appears:

> "That nothing in this act contained shall be deemed in anywise to impair any rights and privileges which have been or may be acquired by any foreign nation under the laws and treaties of the United States relative to the duty on tonnage of vessels." (12 Stat., 558, Chap. clxiii, Sec. 15.)

The Act of March 3, 1883, Section 11, provides:

> "Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act; but whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated, the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof." (22 Stat., 525, Chap. cxxi, Sec. 11.)

This section was construed by this Court in *Kelly* v. *Hedden*, 124 U. S., 196, where it was said:

"This case, except in one particular, presents the same questions considered and determined in *Whitney* v. *Robertson*. The exceptional circumstance is this, that the act of 1883, under which the duties were levied and collected, to recover which the action is brought, declares that nothing in it 'shall in any way change or impair the force and effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act.' 22 Stat., 525. The most that can be conceded to this provision is, that it leaves a previous treaty relating to the same subjects unaffected by the act. *Our observations in the former case, as to the effect of subsequent legislation in conflict with the stipulations of a treaty, are therefore inapplicable to the present case.*" (Italics ours.)

In other words, the subsequent legislation did not abrogate or repeal the stipulations of an antecedent treaty, such stipulations being expressly saved by a form of words closely analogous to Subsection 7.

The case of *Kelly* v. *Hedden* covered a shipment of sugar from San Domingo made under the Tariff Act of 1883, which contained, as we have just seen, a provision saving the treaty rights from destruction. It differed from the case of *Whitney* v. *Robertson* therein referred to, decided on the same day, in that the latter case dealt with San Domingo sugars imported in 1882 under an earlier tariff act which did not contain a clause saving the treaty rights. In both cases, however, this Court held that the absence of a reciprocal treaty with San Domingo, such as existed with Hawaii, in itself operated to exclude the sugars from free entry.

On March 3, 1891, Congress passed an act to save treaty rights to the Hawaiian Islands. That act read:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That nothing in the act approved October first, eighteen hundred and ninety, entitled 'An act to reduce the revenue and equalize duties on imports, and for other purposes,' shall be held to repeal or impair the provisions of the convention respecting commercial reciprocity concluded January thirtieth, eighteen hundred and seventy-five, with the King of the Hawaiian Islands, and extended by the convention proclaimed November ninth, eighteen hundred and eighty-seven; and the provisions of said convention shall be in full force and effect as if said act had not passed." (26 Stat., 844, Chap. 534.)

This law was acted upon by the executive officers of our Government as shown by T. D. 10824 notifying collectors and other officers of the customs of its passage.

In the Tariff Act of August 27, 1894, the proviso to the sugar paragraph (182½), reads:

> "Provided further, *That nothing herein contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the King of the Hawaiian Islands on the thirtieth day of January, eighteen hundred and seventy-five, or the provisions of any Act of

Congress heretofore passed for the execution of the same."* (28 Stat., 521, Chap. 349.) [Italics ours.]

It will be noted that this proviso treats of the same subject matter as did the Act of March 3, 1891, that is, the saving of treaty rights from the implied repeal of the later law. The draftsman of the act, however, undertook to phrase that intent in somewhat different language and adopted for the first time the precise language found in Subsection 7 here involved. Again the Executive Department acted in accordance with the terms of the proviso and, as is known, sugars from the Hawaiian Islands were granted free entry under the terms of the Act of 1894.

The same proviso in identical language is found in Paragraph 209 of the Tariff Act of July 24, 1897 (30 Stat., 168) and appears to have been similarly acted upon by the Executive Departments of our Government.

When Congress came to frame the Tariff Act of 1909, it was not necessary to save any treaty rights of the Hawaiian Islands, but it was necessary to save the treaty rights of Cuba from possible legisla-

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*By the 5th Article of the Treaty with Hawaii of 1875, it was provided that the Convention which was to remain in force for seven years should not take effect until a law to carry it into operation had been passed by Congress. Such a law was enacted, as the Government states. It is interesting to note that thereafter the treaty was extended by a supplementary Convention and on March 3d, 1887, Mr. Tucker from the Judiciary Committee of the House made a report in which he pointed out that the extension was "proposed to be done without the consent of this House and without a law of Congress. The original treaty was conditioned for its effect in an act of Congress. That act sanctioned the terms of the treaty for seven years. This supplementary convention extends its operations for seven years more and *does not condition this extension on an act of Congress*" (H. R. No. 4177, 49th Cong., 2nd Session). Nevertheless no act of Congress was ever passed, but the supplementary Convention remained in force until the Hawaiian Islands became merged with the United States.

tive destruction. This was accomplished in Section 3 of the Tariff Act of 1909 and the form of expression used was the identical form used in the Acts of 1891, 1894 and 1897 with respect to the Hawaiian Islands:

> "Sec. 3. *That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same." (36 Stat., 83, Chap. 6, Sec. 3.)* [Italics ours.]

Section 3 was enforced by the executive departments and on all merchandise imported from Cuba during the lifetime of the Tariff Act of 1909, the regular duties were assessed under that act less the 20 per cent. reduction granted to Cuban products by the Cuban Treaty.

When Congress came to the Tariff Act of 1913, and it again became necessary to save the rights granted by the Cuban treaty, both the House and the Senate united without discussion or controversy upon the same form of expression to save treaty rights from legislative destruction as had been used in 1909—a form of expression frequently theretofore employed and invariably recognized by the executive departments of the Government as saving treaty rights without further legislation. Section IV, Paragraph B, of the Act of 1913 reads as follows:

> "That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the

*This treaty (Art. XI.) was especially conditioned upon an act of Congress.

treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed." (38 Stat., 192.)

In the same way, when Congress drafted Subsection 7 with the purpose of saving treaty rights clearly before it, the same language, so well defined and understood by the legislative and executive departments, was naturally adopted.

It is therefore apparent that the framers of the Act of 1913, in Subsection 7, used a form of words which had come to be accepted as a model when it was desired to accomplish the same definite purpose.

It is futile to suggest in view of the foregoing analysis, that this language is not "apt" or that it is unfamiliar to Congress (Government Brief, 51). It is true that other forms of expression have been employed, but it is also true that in tariff legislation, as we have demonstrated, Congress has repeatedly expressed a preference for the precise form of language which we find in Subsection 7.

VI.

The Act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result.

Keep within the terms of the enactment, give to it the only meaning it can have, and there is

in it neither doubt, contradiction, absurdity nor unwisdom. To find any objection to the only construction of which the Act admits, the Government turns from the statute books to the shipping statistics of the nation, and in these, and not in the terms of the statute, finds all the staple of its argument. From these it finds that the statute has to a large extent been emptied of immediate use by the proviso and so concludes that the proviso was not designed to restrict the scope of the discrimination in favor of American shipping, but to withdraw it altogether.

Take the shipping statistics out of the case, hold to the unmistakable words of the law, and there is no evidence of an *impasse*, none of a legislative deadlock, and none of a legislative fraud or farce.

The volume of imports in treaty nation vessels is relied upon as nullifying the law. And yet the law, in its proviso, plainly recognizes that there are nations with which we have reciprocal commercial agreements, and that these are not to be impaired. How many, the law does not suggest and the number is not fixed beyond enlargement or diminution. Treaty agreements are subject to change and abrogation. But as they stood, so far as the present legislative intention was concerned, they were to continue unchanged. And by the terms of the law, there was to be this discount for the benefit of the American merchant marine and as to some nations no other or higher duties upon imports in their vessels than upon like imports in our own. This, we repeat, necessarily follows from the terms of the Act. There are nations with which we have no treaties of the kind in question, and they have a trade, carried on in their ships, with this country. And

the treaties with some other nations are not in all cases comprehensive of all their trade with us. So there is a considerable importation to which the discount does not apply, and as to this the American ships and as well the ships of the favored nations would have an advantage. These facts are matters of common knowledge; so much so that no evidence was introduced respecting them. Statistics compiled by the Department of Commerce, contained in reports on the "Commerce and Navigation of the United States," were available as public documents. Congress will be presumed to have been familiar with them.

Counsel are not agreed as to the amount or proportion of foreign tonnage that would share in the benefits of the discount, and the amount or proportion that would be excluded therefrom, but the meaning of the Act and its validity cannot depend upon the extent of the preponderance of the one class or the other. There is without question a large volume of imports not entitled, in any view of the law, to the discount (*infra*, VII, p. 57).

This legislation, as its history shows, was deliberately enacted with a full knowledge of the facts and circumstances to which it applied and of how it would operate and with its consequences very distinctly pressed upon the attention of Congress.

As first introduced, the subsection read simply,

> "That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchandise as shall be imported in vessels built in the United States and which shall be wholly the property of a citizen thereof."

Before it passed the House it was amended to broaden its scope as to the ships coming within its provisions. Instead of being confined to "vessels built in the United States, and which shall be wholly the property of a citizen thereof," it was extended to all "vessels admitted to registration under the laws of the United States."

In this amended form it passed the House and in this form it is conceded the law would be valid, efficient, and presently effective. In this form it discriminated in favor of the shipping of the United States and was believed to discriminate against the shipping of the rest of the world.

While the bill was before the Senate the Secretary of the Treasury wrote to the Secretary of State expressing apprehension that the subsection was in "violation of many of our treaties with foreign nations" and suggesting that the opinion of the Counselor of the State Department as to its effect be secured. (Senate Document No. 179, 63d Congress, 1st session.)

The Counselor of the State Department confirmed the apprehensions of the Secretary of the Treasury, and it appeared indeed that a number of nations had made protest against the enactment of the law as in violation of the treaties with them. The Counselor, after quoting from the treaties, said (Cong. Rec., Vol. 50, Part 5, p. 4237):

> "The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels. Governments having treaty stipulations with the United

States such as those above quoted probably would not object to the discount if it were extended, in conformity with those stipulations, to merchandise imported into the United States in their respective vessels; but they would not acquiesce in a discriminatory levy of lower duties on goods imported into the United States in American registered vessels because it was called a discount. It is the fact that a lower duty is charged, and not the term by which the reduction is described, with which the department is obliged to deal."

Nothing could be more explicit than this. And it is to be observed that Mr. Moore points out the very mode of avoiding violation of treaty agreements that was adopted by Congress, viz., extension of the discount to the treaty nation vessels. Allow the discount only upon imports in American bottoms, he says, and the treaties are violated. Extend it in conformity with the treaty stipulations to imports in the vessels of the treaty nations and the treaties are not violated.

There were open then two ways of avoiding the impairment of the treaties, one was not to allow the discount at all, and the other to extend it to imports in treaty nation vessels.

The Finance Committee of the Senate chose the first method and recommended striking out the subsection, giving as a reason that it "was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation and was very properly protested against by the high contracting parties with whom we had the treaties." Furthermore, the Committee said the proposed discrimination would invite retaliation from the countries discriminated against, and in this scheme of retaliation most of our opponents would have the better

of it (Cong. Rec., Vol. 50, Pt. 3, p. 2515; see, also, Pt. 5, p. 4494). The Senate, pursuant to the recommendation of the Committee, struck out the section and as thus amended passed the bill.

The House, however, would not accede to the amendment and stood fast in favor of the discount so far as imports in American vessels were concerned.

The bill then went to conference and the Conference Committee restored the section as it was passed by the House and adopting the second method of avoiding impairment of the treaties added the proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." In this form the section was accepted by both Houses, approved by the President and became the law of the land.

Each House conceded something and each House held to something of its views. The House of Representatives gave up, in favor of the treaties, the exclusive feature of the section as first formulated by it, and the Senate yielded its objection to the section on the score of the retaliation it would invite. The House secured the discount on imports in American vessels and the Senate the preservation of our treaty stipulations by extending the discount to imports in treaty nation vessels.

That this greatly diminished the advantage which the section in its original form immediately gave to American shipping is obvious. The proviso could have no other effect. Its plain purpose was to preserve treaty obligations and so it extended the discount to imports in treaty nation vessels. The protest of the treaty nations was not against the grant of a discount; that would violate no

treaty. The protest was against a grant exclusively to American vessels, and such a grant would violate or abrogate the treaties. In recognition of the protest and to avoid impairment of the treaties, the amendment was made and the bill being so amended, Congress passed it and the President signed it.

Obviously then Congress intended to give by means of this Act some present advantage to American shipping, great or small, as the field of the practical operation of the proviso was small or great. This was not a measure of sheer folly, however great the proportion of the foreign tonnage sharing in the discount; the advantage might be enlarged from time to time by changes in our treaty agreements. It was a beginning and a substantial beginning of a policy of favor and there is nothing to indicate a purpose to make an end of it at the very moment and by the very act of bringing it into existence. But the Government's contention implies such a purpose, an implication not permitted by the terms in which the Act is expressed, not required by its underlying policy, and finding support only in an assumption of the unwisdom of the Act.

The argument of the Government might with equal force be directed against another provision of the Tariff Act,—Subsection 1 of Paragraph J of Section IV, reading as follows:

> "That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into

> the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, * * *." (38 Stat., 195.)

This like Subsection 7 might be taken bodily out of the Tariff Act without impairing its integrity as an act imposing duties and might also well be the subject of a distinct enactment.

These two laws are of the same general nature, but operate by converse methods. The purpose of each is to promote American shipping interests and to do this without violating treaty obligations. The one allows a discount of five per cent. on all duties to the favored ships and the other adds a discriminating duty or penalty of ten per cent. on all imports by vessels not within the Congressional favor.

The penalty is plainly imposed by the general enactment contained in Subsection 1 on all imports from across seas which do not come to the United States in American bottoms, not exempting those first brought to Canada or to Mexico and then across the border to the United States. The advantage of the general enactment under each subsection falls upon the same objects. American ships and only American ships get the discount, and only American ships escape the penalty. The advantage to American shipping resulting from each of the laws in this unqualified form is very great, but we must not overlook the provisos. That

of Subsection 1 is different in form from that of Subsection 7, but their effect is similar in that they both except treaty nation vessels from the discrimination. The discriminating duty is not to apply to importations by vessels of the treaty nations and the discount is to apply to such importations. In each case the advantage to American shipping conferred by the general enactment is diminished by the proviso, done in the one case by withholding the penalty, and in the other by extending the discount.

The Government does not contend that Subsection 1 is invalid and yet it undertakes to show that it has been emptied of all its use, by reason of its proviso, which is of even larger scope than that of Subsection 7, for it extends not only to treaty nation vessels, but as well to such as may by act of Congress be entitled to the same favor as American vessels. The acts of Congress referred to may be repealed and the treaties may be abrogated, one or more of them, and in the measure in which this is done, the subsection is made useful, and without any change in its own terms, without reenactment, the discriminating duty it provides for will apply, and at the last may extend to all the shipping of the world other than our own. The Government deals with this subsection as in force and effect notwithstanding that its present scope by reason of treaties and Acts of Congress is so small "that collectors of the customs have been directed to collect the discriminating duties only when thereto specifically instructed, and the records of the Treasury Department show not a dollar collected under the discriminating provision of the Tariff Act of August 5, 1909, 36 Stat., 11, 87, c. 6, Sec. 15, during the fiscal years 1910, 1911, 1912 and 1913; and not a dollar has been collected to date under this Section IV, Paragraph J, Sub-

section 1, of the present Tariff Act" (Government Brief, p. 73). The law is there, a valid enactment, and a change in the situation to which it is applicable, may make it of the greatest use without any change in its own terms.

Subsection 1 and also Subsection 2 (a somewhat similar provision) are in full force ready for immediate application. They are to be superseded only by treaty or by proclamation or other declaration that foreign nations do not so discriminate against the United States, but they are in effect at all times to preserve a balance. The argument that they are not operative is as fallacious as the suggestion that a statute denouncing penalties for an offence is not operative because no one commits the offence.

Moreover, it should be noted that as to Subsections 1 and 2 the conditions under which they are to be suspended are expressly stated in the statutes, either as part of the section itself as in Subsection 1, or as an independent provision as in Subsection 3. In the proviso of Subsection 7 no conditions precedent to the immediate extension of its benefits to treaty nations are found.

The Solicitor General further argues (Brief, p. 75):

> "Yet if the analogy between the two subsections is to be followed, we find that as the discriminating duty of 10 per cent. under Section 1 is in no case collected, so, also, the discriminating discount in Subsection 7 should in no case be allowed."

This is a *non sequitur*. The very reasoning which requires that the discriminating duty under Subsection 1 shall not be imposed, obviously requires that the discriminating discount of Subsection 7 shall, as to imports in treaty vessels, in no case be *denied*. Stated somewhat differently, as

the discriminating duty of 10 per cent. under Subsection 1 is in no case *collected*, because all nations have brought themselves within the protection of the exception therein either by treaty or by having observed the provisions of the Act of Congress (R. S., 4228), so the discriminating discount in Subsection 7 should in no case be *denied*, where a vessel is protected against such denial by treaty.

The consistency of this legislation, the harmony of these two subsections, shows that Congress was acting deliberately and not at haphazard. Subsection 1 is a familiar piece of legislation and as the Solicitor General says (Brief, p. 70), "has been incorporated from time to time, with trifling modifications, in the several tariff acts since the policy of reciprocal immunity from discriminating duties was inaugurated." Like Subsection 7, however, its principal clause discriminated in favor of American shipping and its proviso or qualifying clause restricted that discrimination in its scope, and so much so that not a dollar of the duty through which it was to be accomplished was collected under the Tariff Act of August 5th, 1909. And yet it was incorporated in the Act of 1913 and not because of an *impasse* or of a legislative deadlock and not as a legislative fraud or farce. "A poor thing," the Solicitor General says, but Congress says "mine own."

Whatever is said of Subsection 7 is just as applicable to Subsection 1. In each case to find any support for the argument against its validity we must go outside the terms of the enactment to our shipping statistics and, finding the discrimination in favor of American shipping resulting from the actual operation of the laws not as great as we think it should be, determine that the enactment

is not a wise one, and that therefore Congress did not mean what it said.

The proviso in either case certainly did not nullify the principal clause by rendering it impossible of performance. It is certainly possible to collect the discriminating duty under Subsection 1, whether it falls upon much or little of our importations. "These might be more, or might be less, or might be nothing" (*Russell* v. *Williams*, 106 U. S., 623, 625). It is equally possible to allow the discount under Subsection 7, however much or little of our importations may be entitled thereto.

We have then to deal with a law deliberately and intelligently enacted, expressed in very plain terms, and to the operation of which, according to those terms, no obstacle of any kind exists.

VII.

Substantial discrimination in favor of American vessels in fact results from respondents' construction.

As we have heretofore pointed out, we are not concerned to ascertain the precise operation of the law or the precise extent to which our shipping would be benefited by it. (*Weber* v. *Freed*, 239 U. S., 325, 330.)

Nevertheless, the brief of the Government makes it plain that its whole case rests, directly or indirectly, on the assumption that the benefit from the operation of Subsection 7 will not be so great as might be desired, and that only partial discrimination will result, from which it concludes that the subsection is a nullity. The Government has been at great pains to cull statistics from official sources in an attempt to fortify this contention, but has overlooked the fact that Congress never intend-

ed Subsection 7 to provide more than a partial discrimination in favor of American shipping. As the bill was introduced into the House and as it passed that body without the proviso, it discriminated at most to the extent of 40 per cent. of our imports, for at no stage in its history did it assume to apply the discrimination to free goods. Such goods are left on a parity as to all vessels, and they constitute 59.54 per cent. of our imports (Com. & Nav., 1914, p. xv). Manifestly it was not designed even by the House of Representatives to make the operation of the provision coextensive with the imports of the United States.

It would seem that the failure to take this fact into consideration, with the consequent confusion of dutiable and free goods, has led to serious errors in the tables set forth on pages 61 *et seq.*, of the Government's brief, the correction of which produces entirely different results.

It is of course impossible to ascertain the exact amount of discount that would be allowable to goods now imported in non-treaty vessels were they diverted to American vessels, for, as the discrimination is based upon a percentage of the duty, such a calculation rests upon the exact amount of goods imported not now entitled to the discount, and the rate that each such imported article would pay. Besides this, it would be necessary to know the origin of all goods imported in English vessels, for only the products of the British Isles would be entitled to the discount, and this would apply also to French vessels under the Government's theory, although not under ours. These facts are not ascertainable from the official statistics.

The Solicitor General, however, makes an estimate based on the average duties, and assumes to

demonstrate that considering the imports for the year ending June 30, 1914, the discrimination in duties in favor of American vessels would amount to only $1,891,483 annually. This falls far short of the actual amount. Where are the errors?

A glance at the results given (Government Brief, p. 62) shows at once that something is wrong. The total discount of 5 per cent. of the duties collected on goods imported in all ships, American, treaty and non-treaty, is there stated to amount for the year ending June 30th, 1914, to $9,956,545. A simple calculation shows that this would make the amount of duties collected during that time *$199,130,900*. But according to the statement on the preceding page (61), there were imported in ships into the United States during that time goods to the value of $1,737,708,653 on which the average rate of duty was 14.88 per cent. According to this figure the duty collected was *$258,571,047*. What has become of the other $59,500,000, and the duty discrimination of $2,975,000 represented by 5 per cent. thereof? It is not difficult to find this primary error.

In the statistics given (Brief, pp. 58 *et seq.*) the imports are divided into two broad classes. Thus for the year ending June 30, 1914, the division as stated is:

Total imports in American and treaty bottoms entitled to discount	$1,084,013,731
Not clearly entitled to 5 per cent. discount	653,694,922

Each of these classes contains *both dutiable and free goods*. In the calculation of the duty col-

lected the average ad valorem rate of 14.88 per cent. is taken upon the whole of the first item of $1,084,013,731.

This is the average rate for dutiable and free goods combined in the reference given (Com. and Nav. for 1914, p. xi). The average rate for dutiable goods alone is there given as 37.60%, but as the result, taking the importations as a whole, would be the same whether we figure on both the dutiable and the free goods at 14.88%, or on the dutiable goods alone at 37.60%, we have no fault to find at this time with this method, although it is unscientific, as hereafter pointed out.

But we do object to the application of the combined dutiable and free goods average rate (14.88%) to dutiable goods alone, as is done by the Government when it comes to discuss the value of the imports in what is called "the competitive field," and it is here that we find the primary error. There is first deducted the value of the free goods amounting to $399,463,333, from the total value of the competitive field, $653,694,922, leaving $254,231,589 as the value of the *dutiable* goods in the competitive field. The Government then proceeds to find the duty on these goods by taking the average percentage of *dutiable and free goods combined* (14.88%).

It is at once apparent that instead of taking 14.88% of the value of the dutiable goods alone ($254,231,589), there should either have been taken 37.60% of that amount, or 14.88% of $653,694,922, the value of the dutiable and free goods combined.

Using, for the sake of consistency, the latter method, it will be found that the duties in the "competitive field" will be 14.88% of $653,694,922,

or $97,269,804 instead of $37,829,660. Thus the "total possible benefit to American bottoms" (5% of the duty), instead of being $1,891,483, will be $4,863,490.

This is certainly a substantial discrimination. But it will be noted that the Government's table combines the total discount to American and treaty ships and treats them as one. If we separate these two items, using its figures, and add the amount of discount on goods now carried in American ships to the possible amount that may come to them by reason of the discrimination, we find the following result:

1914		
Discount to American ships	$1,439,079	
Possible from competitive field	4,863,490	
Total possible discount to American ships		$6,302,569
1913		
Discount to American ships	$1,376,747	
Possible from competitive field	4,994,377	
Total possible discount to American ships		$6,373,124

The above calculations are based on the exact figures and the exact method followed by the Government, saving its primary error. We pass now to a second error.

Although the Government's brief (p. 59) calls attention to the fact that under the decision of the Court below goods in French ships would not be entitled to the discount, nevertheless it in-

cludes the value of such goods imported in French vessels in the amount entitled to the discount. Their value should, on the contrary, according to the Customs Court decision (Rec., pp. 64, 65), be transferred to the competitive field. In passing it may be said that no case involving the French treaty is before this Court. A French treaty claim appearing in one of these causes was abandoned before the Court of Customs Appeals, and was so treated in its decision.

A third manifest error appears in connection with the British indirect trade. The British treaty expressly limits the right to the discount to the *products* of the British territories in Europe; but the Government's table has treated *all* goods coming from Great Britain in British ships as entitled to the discount.

It is well known that the transhipping of goods *via* England is very heavy. It is erroneous to assume that all the vast shipping of the greatest maritime nation of the world coming from England is the product of the British Isles. Although accurate figures are lacking, we conclude from our investigation that we are more than conservative in assuming that at least 25% of goods shipped from the British Isles in British ships are not the products of British territories in Europe. We are therefore justified in transferring one-quarter of this amount to the competitive field.

With the above errors eliminated, we present a table showing more accurately the possible benefit to American shipping resulting from the allowance of the discount on American and treaty vessels. We discuss only the figures of 1914 for the sake of brevity, although like errors appear in the Government's computations for 1913.

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1914.

Total imports (Com. & Nav. U. S. 1914, p. xiii)		$1,893,925,657
Brought on cars and other land vehicles (p. 299)		156,217,004
Total imports in vessels		$1,737,708,653
Steam Vessels:		
Austrian	24,358,126	
Belgian	35,461,566	
Dutch	68,779,035	
German	241,318,841	
Italian	34,666,994	
Japanese	55,305,703	
Norwegian	66,440,187	
British[1]	203,490,248	
Total imports in treaty-nation bottoms		$729,820,700
Imports in American and non-treaty bottoms		$1,007,887,953
Total imports in American bottoms		$193,424,634
Total imports, the transportation of which might by possibility be diverted to United States bottoms by the 5 per cent. discount		$814,463,319
Average ad valorem rate (p. xi) per cent		14.88
Total duties thereon		$121,192,141
Discount on same at 5 per cent., representing total possible benefit to goods in American bottoms by diverting all imports in the competitive field		$6,059,607
Discount to American vessels (5% of 14.88% on $193,424,634)		$1,439,079
Total possible discount to American ships as discriminatory duties		$7,498,686

[1] $271,320,331 less 25% assumed not to be the product of British territories in Europe.

Now, if the Government's estimate of $1,891,483 as the possible benefit to American ships from the competitive field is increased to $6,059,079 through the elimination of its errors, it is manifest that the amount of discrimination enjoyed by treaty nation vessels, which is given by it as $6,625,983 ($8,065,062 less $1,439,079 American), must be greatly reduced. Just what that amount may be is immaterial, but it is plain that it is considerably less than the amount in the competitive field, and far less than the amount that might possibly be enjoyed by American ships.

The foregoing table follows the general plan suggested by the Government with the errors corrected as above pointed out.

From the table as corrected, it will be seen that the total possible benefit to American ships from the competitive field, based upon the figures of 1914, when expressed in duty figures, is something over $6,000,000; but it should be remembered that the discrimination granted by Congress, although expressed in terms of discount of duty, was really a discrimination for the purpose of encouraging American shipping. It is plain, therefore, that the Government's table, either as given by it or as corrected by us, does not really state the discrimination in the form intended by Congress. That discrimination should properly be expressed in terms of increased American shipping rather than in terms of discount of duty.

We may, however, deduce this discrimination in terms of shipping from the duty terms of the table. We have shown that there will be a discount of over $6,000,000 in the competitive field. What does this represent? If 5 per cent. discount on the duty is $6,000,000, obviously the duty amounts to $120,000,000. The average ad valorem rate on dutiable goods is 37.60 per cent. (Com. & Nav., p. xi); so the value of the goods on which this duty is collected is approximately $320,000,000.

We are now able to understand in terms of shipping just what the discrimination in the competitive field amounts to, and we can gain a further appreciation of its significance by comparing this amount with the value of the dutiable goods imported in American vessels for the year ending June 30, 1914.

Again turning to our statistics (Com. & Nav., 1914, p. xi), we find that the average percentage of all dutiable goods imported is 40.46 per cent. The total of dutiable and free goods in American vessels being $193,424,634, we find the value of the dutiable goods to be $78,259,606.

Comparing this last figure with the amount of dutiable goods which might be diverted to American ships through the inducement of the discount, to wit, $320,000,000, we see that by this inducement the value of dutiable goods in American ships may possibly be *increased* more than four times its present amount. We might add that this disre-

gards increased importations of free goods.* It is fair to assume that with the great possible increase in the quantity of dutiable goods carried in American vessels suggested by the above figures, there would be a substantial increase in the carrying of free goods, owing to the fact that shippers would naturally be disinclined to split their cargoes.

When we come to consider how much of this competitive field may be secured by American ships as against treaty ships, we find that the Government has again overlooked a very salient point. It is stated (Brief, 65), that only the most robust optimist could believe that this 5 per cent. discount would enable American vessels to monopolize the gross total of imports in the competitive field. We agree that American vessels could not hope to monopolize the gross total of imports; but it must be noted that in its effort to seize or monopolize the imports in the competitive field, the United States would really have but one first class competitor, namely, Germany. Neither Great Britain, the largest

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*Let us, for the purpose of avoiding all dispute, accord to the Government the reductions from the competitive field claimed as to France and England. In other words, let us assume that French goods in French vessels are entitled to the discount and that all goods coming from England are the products of the British Isles. The value of the dutiable goods remaining in the competitive field would then be $256,000,000, representing a possible increase of 3¼ times the present value of imports in American ships, without counting the free goods.

maritime carrier,* nor France nor Russia could enter this field, because it would not be able to offer the benefit of the discount. The next largest competitor would be Holland, whose imports to this country of goods of all nations for the year ending June 30, 1914, amounted to $68,779,035 as against $193,424,634 carried by American vessels.

In the face of all this, how can it be said that Congress legislated unwisely? Must the American merchant marine be deprived of the chance to rehabilitate itself because in doing so it may still have to fight some competitors?

Satisfying as the above figures may be, they are, however, interesting only from a speculative standpoint. Some benefit to American shipping was intended and some benefit results, and the extent to which other nations share in that benefit affects only the question of the measure in which the obvious purpose of the act is realized in operation.

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*It might be inferred from the Government's figures (Brief, p. 62) that the British indirect trade amounted to only $399,463,333. The total imports in British vessels amounted for the year 1914 to $849,003,373 (Com. & Nav. 1914, p. 299). By the Government's figures (Brief, p. 61) only $271,320,331 of that amount was imported direct from the United Kingdom, leaving $577,683,042 for the British indirect trade.

Nor is the percentage of free goods in the British indirect trade so great as indicated by the percentages of free goods given in the list of certain countries and dependencies on pages 61, 62, of the Government's brief. Our learned adversary picks out here and there a few countries and dependencies whose percentage of free goods is high, but ignores others where the percentage of free goods is low. While he mentions Jamaica, Trinidad and Costa Rica as having a percentage of 95 to 97 free, he does not refer to the fact that the percentage for the total West Indies is 17.68 free. He picks out Japan, 78.70 per cent., but overlooks Turkey in Asia with 17.08 per cent. (Com. & Nav. 1914, p. xv). The only African country he selects is Egypt, with a percentage of 97.06. Had he considered the total British Africa he would have found a percentage of 51.49 (ibid.).

It might further be said that even if we take the percentage of free goods as stated in the Government's brief, we find about $24,000,000 of this amount on the dutiable list, yet in the calculation the entire amount is treated as free of duty. The average percentage of free goods in the British indirect trade is probably very close to the average percentage of free goods from all countries.

VIII.

The subsection became effective with the Tariff Act itself.

Finally, the Government itself recognizes that there is an intelligent policy underlying the subsection and that it admits of being put into operation, with all the intended results, but not at once. And so the view is presented that the Act may not have been stillborn, but was ushered into being in a state of suspended animation, to waken into life and activity, when the conditions under which it operates will make its operation more productive of results. But here again the shipping statistics and not the terms of the statute are appealed to for support of the argument.

So it is suggested that the law may be the present declaration of a policy of discrimination in which this Government will actively engage when, by the abrogation of existing reciprocal commercial agreements or treaties with other nations, the discrimination will be more productive of favor or benefit than now to American shipping, and until then the law is not to operate.

But the law by its plain terms is immediately effective. "A discount of 5 per centum on all duties imposed by this Act shall be allowed, etc., etc." There is no postponement on any account whatever, and no contingency stated to the happening of which the taking effect of the statute is deferred. In *Dunlap* v. *United States*, 173 U. S., 65, the act directed a refund of taxes on alcohol to be made in compliance with regulations to be prescribed by the Secretary of the Treasury, which regulations, as the Secretary pointed

out to Congress could only be *formulated* at an expense of half a million of dollars, for which no appropriation was ever made (*ibid.*, p. 75). The Court held simply that the refunding could not be enforced until the regulations were made. But here there is nothing to be done by the Secretary or any other official of the Government, as a condition of allowing the discount. Nor is this act like the Canadian reciprocity act of July 26, 1911, which in terms was to become operative only when the President should issue a proclamation. The law is absolute in its mandate.

Further than this the very terms employed in the preamble of the Act of October 3, 1913, provide that the duties which it prescribes shall be levied, collected and paid on and after the day following its passage; and Paragraph U of Section IV of the Act provides:

> "U. That unless otherwise herein specially provided, this Act shall take effect on the day following its passage."

As already seen there are various provisions of the act which are in express terms postponed in operation (*supra*, p. 13), but Subsection 7 is not one of them.

The Government is not explicit as to the time when the act may take effect. It says (Brief, p. 82):

> "while the act under consideration is inoperative at this time, circumstances may arise under which it will be effective. If in the future these conflicting treaties should be abrogated or repealed, or by diplomatic negotiations be supplemented or modified, the way would be open for goods in American vessels to receive the preferential discount of 5 per

cent. The contingency may be remote, but it is none the less possible."

This seems to us contradictory of the main argument made by the Government. The law must be in effect now as a law and according to its terms, for no re-enactment is suggested as necessary to its coming into effect. And the abrogation of the treaties is not a contingency to the happening of which the effectiveness of the law as a law is by its terms postponed. The abrogation of the treaties is not at all essential to make the law effective, but is essential to make it more efficient in operation as a measure of discrimination in favor of American shipping. It has some efficacy now; how much is a matter of dispute. The abrogation of the treaty with Italy would make it more efficient, and as one treaty after another is abrogated the act would increase in efficiency in its operation until the last treaty was out of the way. When would the law become effective so that it would operate at all, be the resulting benefits to American shipping much or little? Must it be postponed until the resulting discrimination was against the whole world, any reciprocity whatever being excluded? Or would it be enough that the discrimination was against the major portion of the foreign shipping? In any event it would be the law as it is now written, speaking as it does now, in the present tense, not deferred to any future event, that would be in operation. The remote contingency, whatever it may be, is not expressed in the law and is suggested only by the necessities of the Government's position.

IX.

Goods arriving in vessels of the United States or in vessels of treaty nations prior to October 4, 1913, warehoused on arrival and withdrawn from bonded warehouse on or after October 4, 1913, are entitled to the discount.

All our discussion on this point is based upon the assumption that the discount is allowable on goods which arrived in American or treaty nation vessels after October 3, 1913, and were entered for consumption.

The causes of *United States* v. *James Elliott & Co. et al.*, No. 499 (foreign registration); *United States* v. *Wood & Selick et al.*, No. 501 (American registration); *United States* v. *Cullman Bros. et al.*, No. 504 (foreign registration); *United States* v. *Louis Meyers & Son*, No. 506 (American registration), relate to merchandise imported prior to October 3, 1913, but withdrawn from warehouse subsequent to October 4 and liquidated under the law of 1913.

The general law as to such merchandise has long been embodied in provisions corresponding to Section III, Paragraph S, of the present law, and to Section IV, Paragraph Q, which read as follows:

> Sec. III, Par. S: Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, *on payment of the duties and charges to which it may be subject by law at the time of such withdrawal.* [Italics ours.]
>
> Sec. IV, Par. Q: That on and after the day when this Act shall go into effect all

goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, *shall be subjected to the duties imposed by this Act and to no other duty, upon the entry or the withdrawal thereof.* [Italics ours.]

The plain effect of this language is to put warehoused goods arriving prior to October 4, 1913, and withdrawn thereafter upon precisely the same terms as goods arriving and entered after October 4, 1913. Such provisions are entirely consistent with our settled policy with respect to warehoused goods.

Franklin Sugar Refining Co. v. *U. S.*, 202 U. S., 580.
Fabbri v. *Murphy*, 95 U. S., 191.
Hartranft v. *Oliver*, 125 U. S., 525.
U. S. v. *Goodsell*, 84 Fed. Rep., 439 (C. C. A. 2nd Circt., 1898).
Mosle v. *Bidwell*, 130 Fed. Rep., 334 (C. C. A. 2nd Circt., 1904).
Gump v. *U. S.*, 3 Ct. Cust. App., 137.

The provisions are clear and unambiguous, and provide especially for the manner in which the duties on the goods so arriving, warehoused and withdrawn, are to be ascertained. They require no interpretation.

What is the language of these two provisions with respect to duties on warehoused goods upon the withdrawal thereof? Paragraph Q says that such goods "shall be subjected to the duties imposed by this Act and to no other duty." Paragraph S says warehoused merchandise may be with-

drawn on "payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

Either one of the provisions above quoted fixes the duties applicable to the merchandise in question, but whichever be considered the result is the same. The duty so fixed is the duty imposed by the law at the time of withdrawal. This is the Act of 1913.

The enacting clause thereof, which precedes the dutiable list reads as follows:

> "That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country * * * the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed."

The "dutiable list," which follows the enacting clause in the Act, prescribes various rates of duty for specific merchandise.

If it be suggested that the enacting clause is limited to "the rates of duty" which are prescribed by the "dutiable list," it must also be noted that the clause contains the words "except as otherwise specially provided for in this Act," and that the "Act" does otherwise provide as to warehoused goods in Paragraph Q and Paragraph S.

Taking up first the language of Paragraph Q; how then shall we find the duty "imposed by this Act," of which Subsection 7 is a part, on the warehoused goods withdrawn after October 4th, 1913?

The Solicitor General, adopting as his argument the language of the Board of General Appraisers,

contends that Paragraph Q has no application because Subsection 7 does not "impose a duty" but "grants a reduction," and asserts that "the 'duties imposed by this Act' are such as are specifically enumerated in the first 386 paragraphs of the act" (Brief, p. 85). But, as has just been pointed out, the enacting clause of the act contemplates exceptions to this scheme of assessment.

One of these specially excepted provisions in the Act is Section IV, Paragraph B, relating to the Cuban treaty. Without this paragraph Cuban products would unquestionably be, by the enacting clause, subject to the dutiable list without reduction. Under Paragraph B and the Cuban treaty, however, a reduction of 20 per cent. from the duties fixed by the schedules is granted. Can it be said that the "duties imposed by this Act" on Cuban products are the duties "specifically enumerated in the first 386 paragraphs of the act"?

Another exception is Subsection 7. Without this provision in the Act, goods in American and treaty ships would unquestionably be, by the enacting clause, subject to the dutiable list without reduction. Subsection 7, however, grants a reduction of 5 per cent. from the duties fixed by the schedules. Can it any more be said that the "duties imposed by this Act" on goods in American or treaty ships are the duties "specifically enumerated in the first 386 paragraphs of the act"?

The "duties imposed by this Act" on Cuban products are admittedly the schedule rates with the 20 per cent. reduction under Paragraph B and the Cuban treaty. The "duties imposed by this Act" on goods in American and treaty ships are likewise the schedule rates with the 5 per cent. reduction under Subsection 7 and the treaties.

The meaning of the phrase "imposed by this Act," may be tested by assuming two importations of exactly similar merchandise in vessels of similar registry, one arriving on October 2, 1913, and warehoused; the other, arriving on October 4, 1913, and entered for immediate consumption. Assume that the warehoused importation was withdrawn for consumption on October 4, 1913, so that the duties on both were paid on the same date.

Aside from the question of the 5 per cent. discount, the Government will, of course, concede that the duties on both of these shipments paid on October 4 would be the same. But the discount would obviously be allowed on the goods entered for consumption.

What is there to distinguish the two? Paragraph Q not only says that warehoused goods may be withdrawn and be subject to the duties *imposed by the Act then in force,* but shall be subject *"to no other duty."* If the warehoused goods be denied the 5 per cent. discount, can it be said that they are subjected to no other duty than that imposed on identical goods to which the discount is allowed?

Undoubtedly the word "imposed" as used in Paragraph Q refers to "levied, collected and paid," in the enacting clause, and in this sense it obviously looks to the amount assessable and not to the manner of the assessment, for the word "imposed" is not used in the enacting clause preceding the dutiable list of the Act of 1913. The duties "imposed" under Paragraph Q must *necessarily* be the duties "levied, collected, and paid" under the Act.

Coming now to Paragraph S, it is none the less plain that, by its express terms, merchandise in

bonded warehouse on October 4, 1913, without regard to the time of its arrival in this country, is entitled to be withdrawn "on payment of the duties and charges to which it may be subject by law at the time of such withdrawal." That this means the net duties payable; *i. e.*, the rates of the dutiable list with any deductions elsewhere provided by the Act, is settled law.

Identical language was construed by this Court in *Franklin Sugar Refining Company* v. *United States, supra,* where it was held that Cuban products, imported prior to the date proclaimed by the President of the United States and the President of Cuba for the commencement of the operation of the treaty, placed in bonded warehouse and withdrawn after the proclaimed date, were entitled to the reduction of 20 per cent. by virtue of the very warehouse clause with which we are here concerned, at that time being Section 20 of the Customs Administrative Act as amended December 15th, 1902 (32 Stat., 753). This section corresponded to Paragraph 8, Section III. The Court said (p. 582):

> "The section needs no interpretation. It is clear that it subjects merchandise to the duties prescribed by law at the time it is withdrawn for consumption. *Mosle* v. *Bidwell,* 130 Fed. Rep., 334. And our inquiry then must be, when were the sugars in controversy withdrawn for consumption? If before December 27, 1903, they were dutiable under the act of July, 1897; if after December 27, they were entitled to 20% *reduction* of the duties prescribed by that act." (Italics ours.)

In the *Franklin* case the result was a *reduction* of duties by virtue of the warehouse provision and the treaty, the rates prescribed by the dutiable list

being reduced 20 per cent. So in the present case the dutiable rates are reduced 5 per cent. by virtue of the warehouse provisions and Subsection 7.

The case of *Mosle* v. *Bidwell,* 130 Fed. Rep., 334, cited by this Court in the *Franklin* case, sustained the contention that sugar brought from Porto Rico prior to the cession of that island to the United States by the treaty with Spain, and remaining in bonded warehouse until after such cession, was entitled to free entry by virtue of the warehouse provision—the same Section 20 of the Act of June 10, 1890, as amended. This last case is especially in point, not only because it granted a reduction sufficient to wipe out the entire duty, but also because that reduction was based upon the provisions of our treaty with Spain.

The *Franklin Sugar Refining Company* case, *supra,* also effectually disposes of the Government's further contention (Brief, pp. 83 *et seq.*) that the words "shall be allowed" and "shall be imported" in Subsection 7 make the subsection applicable only to goods which *arrived* in this country after the passage of the Act. That case related to sugars which arrived and were entered for warehouse prior to the proclaimed date of the Cuban treaty. They were withdrawn after the proclaimed date, and this Court held that by virtue of the warehouse provision the discount of 20 per cent. granted by the Cuban treaty applied. Here the discount is claimed by virtue of Subsection 7 and the treaties.

The Commercial Convention with Cuba, proclaimed December 17th, 1903, declares in Article II (33 Stat., pp. 2136, 2137):

> "During the term of this convention all articles of merchandise * * * being the product of the soil or industry of the Republic of Cuba

> imported into the United States *shall be admitted* at a reduction of twenty percentum of the rates of duty thereon as provided by the Tariff Act of the United States," etc. [Italics ours.]

The situation existing in the Franklin case was far stronger for the Government than here for the Cuban treaty provides that "during the term of this convention all articles of merchandise * * * imported * * * shall be admitted" at the reduced rates. The term "imported" as there used was held in effect not to mean time of arrival since the sugars in fact *arrived* before and not "during the term of" the treaty.

Whether the word "imported" under certain circumstances might be construed to mean "arrived" is beside the mark, for the word "imported" as used in the tariff acts as applicable to warehoused goods has uniformly been construed to mean that importation is not complete until withdrawal from the warehouse. Our settled policy as to warehoused goods is that the *importation of foreign goods is not complete as between the importer and the Government, so long as the goods remain in the custody of the officers of the Customs,* and until on withdrawal they enter into the commerce of the country in competition with domestic products.

In *Fabbri* v. *Murphy,* 95 U. S., 191, 197, the Court in discussing the then existing warehouse provision, said:

> "Throughout those provisions, the plain inference is that Congress did not regard the importation as complete while the goods remained in the custody of the proper officers of the customs."

In *Hartranft* v. *Oliver,* 125 U. S., 525, this Court said, referring to a warehouse provision that goods

withdrawn should be subject to no other duty than if the same were imported after the withdrawal date:

> "The plain meaning of this section is, that, though goods are imported before the act takes effect, yet if they are kept until after that period in a public store or bonded warehouse, that is, in the custody and under the control of officers of the customs, they shall be subjected only to the duties thereafter leviable when they are entered for consumption * * *. In other words, goods imported before the act took effect, if kept in the custody and control of the government, are to be charged with duties according to the law in force when they were entered for consumption; that is, when passed over to the control of the importer or owner. * * * There is manifest justice in the rule that goods thus withheld from the control of the owner or importer shall be subject only to such duties as are leviable by the law when he is at liberty to take possession of them. Ordinarily, goods in the custody and control of officers of the customs are placed in a public store or bonded warehouse, and thus the designation of the goods as thus placed is, in the legislation of Congress, in effect a designation, and no more, of their being in such custody."

See also, *Sherman* v. *Robertson*, 136 U. S., 570, following *Hartranft* v. *Oliver, supra; United States* v. *Goodsell, supra.*

The Court of Customs Appeals said, in *Gump* v. *U. S., supra*:

> "Although in fact brought into this country under the prior law no duty had been paid on the merchandise because advantage had been taken of the provisions of the law [referring to the warehouse provisions of the Tariff Act

of 1909], which made it possible to defer such payment until it was entered for consumption —in other words, until it became a part of the merchandise of the country—so that the entire act of importing goods for consumption was still incomplete, and the completion thereof required a withdrawal from the warehouse and such proceedings as would admit them to consumption here. We think this may be as well designated by the term 'withdrawal entry' or 'entry for withdrawal' as any, because it is the final act of entry which withdraws the merchandise from bonded warehouse and completes the importation of merchandise designed to become a part of commerce here.

"It is not the name by which it is called, but the fact accomplished thereby that becomes important. The goods were in bond; they must be removed therefrom to complete the importation; * * *."

The learned Solicitor General would have this Court substitute in Subsection 7 the words "as shall arrive" for the words "as shall be imported." In so doing he is attempting to legislate and not construe. His argument that the discount clause was intended to operate only on future importations, using the word "importation" in a narrow sense of "future arrivals," is met by the decisions of this Court already reviewed and in this case by the Court of Customs Appeals with the reply that the merchandise in bonded warehouse at the time of the passage of the Act *had not been imported* and could not be considered legally as imported until withdrawn from warehouse.

It follows, therefore, that the warehoused merchandise was "imported" under the Act of 1913, and is subject under Paragraph Q to the duties "imposed by this Act and to no other duty," or

under Paragraph S to the duties to which it is "subject by law" at the time of withdrawal. Such duties, we have established, are the specific duties in the "dutiable list," less the 5 per cent. discount under Subsection 7.

X.

If the 5 per cent. discount be allowed at all, Cuban merchandise is entitled to it.

The Government says in its brief (p. 90):

> "It is therefore conceded for present purposes that if the 5% discount be allowed at all, it should be allowed on Cuban goods imported in American bottoms in addition to the 20% preferential rate provided in the treaty" (Brief, pp. 90, 91).

The respondents are therefore relieved of the necessity of arguing this point.

In Conclusion.

Whether the policy of the Government should be one of discrimination or of reciprocity was for Congress to determine, and it did by this Act determine in favor of discrimination. We had treaties with several nations of a nature contravening this policy—agreements of reciprocity—and attention being called to the fact that these might be abrogated by the Act without notice to the foreign nations concerned, to avoid such a discourtesy the proviso was added so as to keep and maintain the treaty obligations until they were changed after due notice and negotiation. The law was effective at once, but its immediate use was restricted, because the treaty agreements restricted the field of its operation. But that field was substantial and

could be enlarged to any extent and as rapidly as this Government desired, and so the use of the statute would be increased. But always and from the beginning the statute had some use of the kind intended, increasing from time to time as the field of its operation was extended. And conceding only that the policy of discrimination is a wise one, there is nothing vain, insincere, absurd or contradictory in such a law.

The judgments of the Court of Customs Appeals should be affirmed.

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February, 1916.

APPENDIX A.

Cause No.	Title	Origin and Kind of Merchandise*	Nationality of Vessel
496	The United States vs. The M. H. Pulaski Company et al.		Netherlands
			Belgium
		Linen handkerchiefs and linens manufactured in Ireland	Great Britain
497	The United States vs. R. B. Henry Company et al.		Austro-Hungary Germany Germany Italy Netherlands Norway Spain
498	The United States vs. James Elliott & Company et al.	Merchandise of the produce and manufacture of Great Britain	Great Britain
			Belgium
499	The United States vs. J. Wile Sons & Company		United States
500	The United States vs. Robert Muller & Company		Netherlands
501	The United States vs. Wood & Selick et al.		Netherlands United States

*Not given unless the product of Cuba or imported in British vessels.

Date of Arrival	Entered in Bond for Warehousing Prior to the Taking Effect of the Tariff Act of October 3, 1913	Date of Entry	Withdrawn from Bonded Warehouse for Consumption and Duties Paid under Paragraph Q, Section IV, of the Tariff Act of October 3, 1913
October 7, 1913	No	October 7, 1913	
October 6, 1913	No	October 6, 1913	
October 7, 1913	No	October 7, 1913	
October 11, 1913	No	October 11, 1913	
November 12, 1913	No	November 12, 1913	
October 17, 1913	No	October 17, 1913	
October 8, 1913	No	October 8, 1913	
October 7, 1913	No	October 7, 1913	
October 9, 1913	No	October 9, 1913	
October 15, 1913	No	October 15, 1913	
July 9, 1912	Yes	July 9, 1912	After October 4, 191
June 24, 1913	Yes	June 24, 1913	After October 4, 191
October 17, 1913	No	October 17, 1913	
October 14, 1913	No	October 14, 1913	
October 17, 1913	No	October 17, 1913	
September 16, 1913	Yes	September 16, 1913	After October 4, 191

ause o.	Title	Origin and Kind of Merchandise	Nationality of Vessel
)2	The United States vs. E. La Montagne's Sons	Gin manufactured or produced in England	Great Britain
)3	The United States vs. Albert Lorsch & Company et al.		Germany Japan Austro-Hungary Italy
		Products of England	Great Britain
)4	The United States vs. Cullman Brothers et al.		Netherlands Netherlands
)5	The United States vs. G. W Faber, Inc.	Cigars the product of Cuba	United States
)6	The United States vs. Louis Meyers & Son		United States
)7	The United States vs. William Openhym & Sons et al.		United States
)8	The United States vs. Park & Tilford	Cigars the product of Cuba	United States
)9	The United States vs. Selgas & Company	Tobacco the product of Cuba	United States

Date of Arrival	Entered in Bond for Warehousing Prior to the Taking Effect of the Tariff Act of October 3, 1913	Date of Entry	Withdrawn from Bonded Warehouse for Consumption and Duties Paid under Paragraph Q, Section IV, of the Tariff Act of October 3, 1913
October 6, 1913	No	October 6, 1913	
October 10, 1913	No	October 10, 1913	
October 22, 1913	No	October 22, 1913	
October 18, 1913	No	October 18, 1913	
October 29, 1913	No	October 29, 1913	
November 12, 1913	No	November 12, 1913	
July 22, 1913	Yes	July 22, 1913	After October 4, 19
May 19, 1913	Yes	May 19, 1913	After October 4, 19
October 7, 1913	No	October 7, 1913	
September 16, 1913	Yes	September 16, 1913	After October 4, 19
October 7, 1913	No	October 7, 1913	
October 16, 1913	No	October 16, 1913	
October 7, 1913	No	October 7, 1913	

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Crandall, Treaties, their Making and Enforcement, p. 145.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER, *v.* THE M. H. PULASKI CO. ET AL.	No. 496.
THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.	No. 497.
THE UNITED STATES, PETITIONER, *v.* JAMES ELLIOTT & CO. ET AL.	No. 498.
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THE UNITED STATES, PETITIONER, *v.* ALBERT LORSCH & CO. ET AL.	No. 503.

THE UNITED STATES, PETITIONER, *v.* CULLMAN BROS. ET AL.	No. 504.
THE UNITED STATES, PETITIONER, *v.* G. W. FABER, INC.	No. 505.
THE UNITED STATES, PETITIONER, *v.* LOUIS MEYERS & SON.	No. 506.
THE UNITED STATES, PETITIONER, *v.* WILLIAM OPENHYM & SONS ET AL.	No. 507.
THE UNITED STATES, PETITIONER, *v.* PARK & TILFORD.	No. 508.
THE UNITED STATES, PETITIONER, *v.* SELGAS & CO.	No. 509.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These fourteen cases, known as the "Five Per Cent Discount Cases," are here on certiorari to judgments of the Court of Customs Appeals, rendered on May 25, 1915 (6 Ct. Cust. App. —).

They involve claims made by sundry importers under section IV, paragraph J, subsection 7, of the tariff act of October 3, 1913, 38 Stat. 114, 192, 196, c. 16. This subsection reads as follows:

> That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

THE TREATIES.

At the date of the passage of this act there were in force between the United States and nearly all of the commercial countries of the world treaties of "commerce and navigation" guaranteeing to the ships and cargoes of the treaty nations when entering each other's ports reciprocal immunity from discriminating duties. These treaties, with the years of their inauguration, are as follows:

> Argentine Republic, 1853, Art. VI, 10 Stat. 1005, 1007; Austria-Hungary, 1829, Art. III, 8 Stat. 398, 399; Belgium, 1875, Art. V, 19 Stat. 628, 630; Bolivia, 1858, Art. IV, 12 Stat. 1003, 1006; China, 1880, Art. III, 22 Stat. 828, 829 (continued by treaty of 1903, Art. XVII, 33 Stat., pt. 2, 2208, 2215); New Granada (Colombia), 1846, Arts. IV,

VI, 9 Stat. 881, 882, 884; Corea (Korea), 1882, Art. V, 23 Stat. 720, 722; Costa Rica, 1851, Art. IV, 10 Stat. 916, 918; Denmark, 1826, Art. III, 8 Stat. 340, 11 Stat. 719; France, 1822, Arts. I, II, VII, 8 Stat. 278, 280; Great Britain, 1815, Art. II, 8 Stat. 228 (indefinitely extended by the treaty of 1827, 8 Stat. 361); Greece, 1837, Arts. III, IX, 8 Stat. 498, 500, 502; Hanseatic Republics, 1827, Art. I, 8 Stat. 366; Honduras, 1864, Art. VI, 13 Stat. 699, 702; Italy, 1871, Arts. I, V, 17 Stat. 845, 847; Japan, 1911, Art. VIII, 37 Stat., pt. 2, 1504, 1506; Liberia, 1862, 12 Stat. 1245; Mecklenburg-Schwerin, 1847, Art. I, 9 Stat. 910, 911; Netherlands, 1852, Art. I, 10 Stat. 982; Norway, 1827, Arts. III, V, 8 Stat. 346, 348; Paraguay, 1859, Arts. VI, VIII, 12 Stat. 1091, 1094; Prussia, 1828, Arts. III, IV, 8 Stat. 378; Spain, 1902, Art. VIII, 33 Stat., pt. 2, 2105, 2109; Sweden, 1827, Arts. III, V, 8 Stat. 346, 348.

Those portions of the same which are material to the present inquiry are printed as Appendix "A."

As a typical example of the treaties above enumerated, save those with Costa Rica, France, Great Britain, and Honduras, Articles III and IV of the treaty with Austria-Hungary of 1829 may be cited:

> ART. III. All kind of merchandise and articles of commerce, either the produce of the soil or the industry of the United States of America, or of any other country, which

may be lawfully imported into the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

ART. IV. To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Austrian vessels and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports

> of the country to which they respectively belong, or from the ports of any other foreign country.

The Germanic treaties, it should be noted, embrace those made with the Hanseatic Republics, 1827, Article I, 8 Stat. 366; the Grand Duchy of Mecklenburg-Schwerin, 1847, Article I, 9 Stat. 910, 911; and the Kingdom of Prussia, 1828, Articles III and IV, 8 Stat. 378. These treaties, it is conceded by all parties, are now binding upon both the United States and the German Empire. See *Terlinden* v. *Ames,* 184 U. S. 270; *Disconto Gesellschaft* v. *Umbreit,* 208 U. S. 570, 581.

The treaties with Costa Rica, France, Great Britain, and Honduras guarantee freedom from discriminating duties only with reference to goods, the growth, produce or manufacture of the contracting nations. Thus, Article II of the treaty of 1815 with Great Britain provides (8 Stat. 228, 229):

* * * * *

> The same duties shall be paid on the importation into the United States of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of his Britannick majesty's territories in Europe of any article the growth, produce, or manufacture, of the United States, whether such importation shall be in British vessels or in vessels of the United States.

The treaties with Costa Rica and Honduras are substantially similar.

The treaty with France of 1822, 8 Stat. 278, on the other hand, provides for discriminating duties, but these are to be reduced annually and have long since been abolished in accordance with the terms of the treaty.[1] The pertinent articles of this treaty are the following:

> ART. 1. Articles of the growth, produce, or manufacture, of the United States, im-

[1] In the compilation of Treaties and Conventions, published by the State Department in 1889, Sen. Ex. Doc. No. 47, 48th Cong., 2d sess., the treaty of 1822 is cited as in force. The compilation was published in response to a resolution of the Senate dated January 5, 1885, directing such treaties or parts of treaties as had been changed or abrogated to be indicated. *Id.*, p. iv.

That the reciprocal abolition of discriminatory duties was the object of the treaty of 1822 appears from the correspondence leading up to the treaty. Sen. Docs. Nos. 352 and 353, 17th Cong., 2d sess., American State Papers, vol. 5, Foreign Relations, pp. 141 to 213. See especially pp. 167, 209.

Volume 5, Moore's International Law Digest, sec. 765, p. 259, states:

"By Article VII of the Treaty of Commerce between the United States and France of June 24, 1822, provision was made for the gradual abolition of all discriminating duties so that a perfect equalization was to be effected on October 1, 1827."

In a letter dated Paris, March 27, 1830, to the Prince de Polignac, Minister Secretary of State for Foreign Affairs of France, the American Minister (Wm. C. Rives) stated (Ex. Docs., 22d Cong., 2d sess., vol. III, 1832–33, Doc. No. 147, pp. 97–98):

"Since the 1st of October, 1827, from which period, under the operation of the commercial convention of 1822, the discriminating duties on both sides have in great part ceased,

ported into France in vessels of the United States, shall pay an additional duty, not exceeding twenty francs per ton of merchandise, over and above the duties paid on the like articles, also of the growth, produce, or manufacture, of the United States when imported in French vessels.

ART. 2. Articles of the growth, produce, or manufacture, of France, imported into the United States in French vessels, shall pay an additional duty, not exceeding three dollars and seventy-five cents per ton of merchandise, over and above the duties collected upon the like articles, also of the growth, produce, or manufacture, of France, when imported in vessels of the United States.

* * * * *

ART. 7. The present temporary Convention shall be in force for two years from the

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French vessels are admitted into the ports of Louisiana, and the other ports of the Union, on the same terms (with the exception of a trifling remnant of the ancient discriminating duties) as the vessels of the United States themselves; and as soon as France will consent to abolish that remnant of discrimination, her vessels will be received, to the fullest extent, and in every respect, on the same terms as national vessels."

In the collection of Treaties and Conventions between the United States and Foreign Powers, entitled the American Diplomatic Code, published in 1834 by Jonathan Elliot, a note to the treaty of 1822, after quoting from Article 7, proceeds as follows (vol. I, p. 133):

"* * * This convention not having terminated, in consequence of the notification of either party, American and French vessels, laden with the produce of their respective countries, continue to be received into the ports of each other, on the same and equal terms."

first day of October next, and even after the expiration of that term, until the conclusion of a definitive treaty, or until one of the parties shall have declared its intention to renounce it; which declaration shall be made at least six months beforehand.

And in case the present arrangement should remain without such declaration of its discontinuance by either party, the extra duties specified in the 1st and 2d articles, shall, from the expiration of the said two years, be, on both sides, diminished by one-fourth of their whole amount, and, afterwards, by one-fourth of the said amount from year to year, so long as neither party shall have declared the intention of renouncing it as above stated.

It should be noted, also, as a fact to which further reference will be hereinafter made, that in addition to the field covered by these treaties the policy of shipping reciprocity has been extended by legislation and executive action thereby authorized so as to include the ships of practically all the nations of the world. It may be said with substantial accuracy that at the date of the adoption of this tariff act not a vessel entered the ports of the United States which was not exempt by law from any form of tariff discrimination.

CLASSES OF CASES.

Under this subsection of the tariff act and these treaties claims to the reduction of five per cent on

duties otherwise imposed by the act are preferred by three classes of claimants:

First. Importers of goods in vessels admitted to registration under the laws of the United States. Such are the foregoing cases of *United States* v. *J. Wile Sons & Co.; United States* v. *G. W. Faber, Inc.* (Cuban cigars); *United States* v. *Louis Meyers & Son; United States* v. *William Openhym & Sons et al.; United States* v. *Park & Tilford* (Cuban cigars); and *United States* v. *Selgas & Co.* (Cuban tobacco).

Second. Importers of goods in vessels registered under the laws of treaty nations. Such are the cases of *United States* v. *The M. H. Pulaski Co. et al.* (goods imported in a Dutch and Belgian vessel and Irish goods imported in a British vessel); *United States* v. *R. B. Henry Co. et al.* (Austro-Hungarian, Italian, Norwegian, Dutch, Spanish, and German vessels); *United States* v. *Robert Muller & Co.* (Dutch vessel); *United States* v. *Wood & Selick et al.* (Dutch vessel); *United States* v. *La Montagne's Sons* (British vessel and British goods); *United States* v. *Albert Lorsch & Co. et al.* (French, German, Japanese, Austro-Hungarian, Italian, and British vessels); *United States* v. *James Elliott & Co. et al.* (Belgian vessel and British goods in British vessel).

Third. Importers of goods brought into the United States before the 3d day of October, 1913, entered without payment of duties and under bond for warehousing, this merchandise being, in turn,

of two classes, (*a*) that imported in vessels of United States registry (*United States* v. *Wood & Selick et al.*), and (*b*) that imported in vessels of treaty nations (*United States* v. *James Elliott & Co. et al.*, Belgian vessel and British goods in British vessel; *United States* v. *Cullman Bros. et al.*, Dutch vessel).

The Secretary of the Treasury, upon advice of the Attorney General, directed the customs officers to reject claims in all these cases. In his letter of instructions to customs officers, under date of November 8, 1913, T. D. 33847, he said:

> The Attorney General having been asked for an expression of his views upon the interpretation of subsection 7 of paragraph J of section 4 of the tariff act of October 3, 1913, he advises the department that the 5 per cent discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers and that consequently the subsection, by the express terms of the proviso, is inoperative.

The Board of General Appraisers sustained the contentions of the claimants of the first class, but overruled the contentions of claimants of the second and third classes (R. 23, 36). The Board considered the discount to be a favor extended only to American bottoms, and that as such it might be enforced notwithstanding the treaties, because the

treaties embodied only executory promises, binding on the political departments of the Government, the breach of which was a political question not within judicial cognizance.

The Court of Customs Appeals sustained the contentions of all claimants (R. 39, 41; Opinions, R. 43 *et seq.*). The majority of the Court of Customs Appeals, considering the treaties to be self-executing, held that they prescribed rules to be enforced by the courts and that the proviso against their impairment was tantamount to an express grant to treaty bottoms.

For the Government it was and is contended that the subsection in clear terms and for the purpose of favoring American shipping alone limited the discount to American vessels; that such a preference, however, would clearly contravene existing treaties; and that whether these latter are self-executing or executory, the proviso forbidding a construction hostile to their covenants forbids also the allowance of the discount proposed. The legislative history of the act, the language employed, the manifest design of Congress, and the absurd consequences of a contrary interpretation, all tend to render this conclusion imperative.

An incidental question was raised in the court below as to the allowance of the discount on importations of Cuban goods in American bottoms, in addition to the 20 per cent preferential discount provided by the treaty with Cuba of December 11,

1902, 33 Stat. 2136, and the act of Congress of December 17, 1903, 33 Stat. 3, c. 1, passed to carry it into effect. The question is not presented here, for it is now conceded that the importers' claims in this respect are valid if a discount may be allowed in any case.

Unless otherwise stated, page references are to the transcript of record in *United States* v. *R. B. Henry Co. et al.; United States* v. *James Elliott & Co. et al.; United States* v. *J. Wile Sons & Co.*, Nos. 497, 498, and 499, respectively.

THE ISSUES.

1. May the 5 per cent discount provided in section IV, paragraph J, subsection 7, be allowed on importations in any case whether (*a*) in vessels admitted to United States registry or (*b*) in vessels of the treaty nations?

2. If the subsection is not altogether void of immediate effect, are goods brought to our shores and entered under bond for warehousing prior to October 3, 1913, but on which duties were not paid until the time of withdrawal after that date, entitled to the discount?

BRIEF OF ARGUMENT.

I. The legislative history of section IV, paragraph J, subsection 7, shows it to be the result of a vain effort to compose differences between the House, which favored discriminating duties to American vessels, and the Senate, which resisted a disturbance of existing treaties.

II. The subsection is void by reason of the irreconcilability of its main clause and proviso; or at least is without present force or effect.

1. The discount can not be allowed to goods *in American vessels alone,* because, so construed, the subsection would abrogate, impair or affect the provisions of existing treaties.

2. The discount can not be allowed to *both American and treaty vessels.* Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed.

3. Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition.

III. In no event may the discount be allowed on goods entered without payment of duty and warehoused prior to October 3, 1913, and not withdrawn until after that date.

IV. The cases of Cuban importations present no separate question.

ARGUMENT.

I.

THE LEGISLATIVE HISTORY OF SECTION IV, PARAGRAPH J, SUBSECTION 7, SHOWS IT TO BE THE RESULT OF A VAIN EFFORT TO COMPOSE DIFFERENCES BETWEEN THE HOUSE, WHICH FAVORED DISCRIMINATING DUTIES TO AMERICAN VESSELS, AND THE SENATE, WHICH RESISTED A DISTURBANCE OF EXISTING TREATIES.

1. It was the purpose of the House to limit the discount to goods in American vessels only, thus discriminating in their favor against the ships of all other nations.

The language which the House employed to accomplish its purpose was clear and unambiguous. As introduced in that body by Mr. Underwood on April 7, 1913, the clause in question read:

> SUBSECTION 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen thereof.

Before the bill was again reprinted it was determined to broaden the grant and extend it not only to vessels built in the United States but to all vessels admitted to registration under the laws thereof. Accordingly in the reprint of April 21 the subsection read:

> SUBSECTION 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and

> merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

In this form the bill passed the House. Cong. Rec., 63d Cong., 1st sess., vol. 50, pt. 2, pp. 1387, 1428.

The words plainly limit the discount to American bottoms. The terms are unmistakable. Unless the importing vessel is admitted to registration under the laws of the United States the duties on goods therein must be paid, without reduction, at the rates elsewhere provided in the tariff act. The proceedings in the House demonstrate that this was the fixed and deliberate intent of that body.

The Ways and Means Committee in its report accompanying the bill (Rept. No. 5, p. LII, 63d Cong., 1st sess., Apr. 22, 1913; Cong. Rec., *id.*, pt. 1, pp. 316, 743) explains this subsection as follows:

> It is a discrimination in favor of American shipping similar to the provisions of some of the first tariff bills that were enacted by the Congress of the United States. Under like legislation the merchant marine of the United States was encouraged and developed in the early decades of the last century until our merchant marine became the largest carrier of merchandise in the world. We believe that to again discriminate in favor of American shipping will build up our merchant fleet and keep at home millions of dollars that are now being paid to foreign

vessels to carry the products of our country to foreign markets.

The policy of discrimination in favor of American vessels began with the Government. The "first tariff bills" referred to provided discriminating duties favoring American vessels exclusively, and were intended to operate to the disadvantage of the vessels of every other nation. The second act of the first Congress, approved July 4, 1789, was a tariff act. 1 Stat. 24, 27. Section 5 allowed a discount of 10 per cent on all duties imposed by the act on articles imported in vessels belonging to citizens of the United States. The second tariff act, approved August 10, 1790, 1 Stat. 180, c. 39, by section 2 imposed an additional duty of 10 per cent on importations in foreign vessels. This provision was subsequently reenacted, from time to time, without substantial change until 1816. 1 Stat. 260, 392, 411, 504; 2 Stat. 84, 299, 769, 804. The policy of shipping reciprocity began only with the act of March 3, 1815, 3 Stat. 224, c. 77, and the British treaty of that year, but thereafter broadened steadily. Beyond doubt it was these earlier exclusive acts which the Ways and Means Committee commended to the imitation of Congress.

Mr. Underwood, the chairman of the committee, said (Cong. Rec., *id.*, pt. 1, p. 744):

> * * * section 7 of paragraph J is a discriminating duty given by this country to its own ships and in favor of its own ships.

And, again, in reply to a suggestion from Mr. Mann that perhaps the discount might be extended by reason of existing treaties to foreign vessels, Mr. Underwood said (Cong. Rec., *id.*, pt. 2, p. 1358):

> Now, there are gentlemen who contend that if subsection J were enacted law it would mean, instead of discriminating in favor of American shipping, that we will reduce the duties on all imported goods coming into this country by foreign vessels by reason of treaty rights. I never have believed in that contention. I do not think it is a fair construction of the law; but I have in my office here letters transmitted to me by the State Department from three of the leading maritime nations of the world, protesting against this section, because they say it is a discrimination against their vessels. Now if the contention that is being made by gentlemen on that side of the House is correct, that goods coming from Germany, or France, or England would be admitted 5 per cent cheaper than they would if this section was removed, I can not see why the ambassadors from three great maritime nations should protest against this paragraph. It may be that the chancellors, supposed to be learned in the law of nations, supposed to be here to guard their own countries, are mistaken as to the effect of this paragraph, and that the gentlemen on that side of the House are better lawyers as to the effect on their commerce and their ships than are the

chancellors, but I am inclined to think that with the weight of their protests leaning in favor of the construction that I placed on this paragraph in the opening of this debate, it is safe to say that in the end this construction will be maintained.

The debates on the bill, which may be consulted, of course, to ascertain the evil aimed at, the legislative history of the act, and the environment at the time of its enactment (*Blake* v. *National Banks,* 23 Wall. 307, 319; *Jennison* v. *Kirk,* 98 U. S. 453, 459; *Holy Trinity Church* v. *United States,* 143 U. S. 457, 465; *Binns* v. *United States,* 194 U. S. 486, 495, 496; *Standard Oil Co.* v. *United States,* 221 U. S. 50; *Lapina* v. *Williams,* 232 U. S. 78, 89, 90; *Tap Line Cases,* 234 U. S. 1, 27; *Seven Cases, Eckman's Alterative* v. *United States,* opinion rendered Jan. 10, 1916), show beyond peradventure that the evil aimed at was the decadence of the American merchant marine.

The subject was not a new one. There had been for many years a widespread demand for some kind of remedial legislation to resuscitate our languishing maritime industries. This induced the President in his annual message of December 7, 1903, to urge upon Congress the appointment of a commission to investigate and report "what legislation is desirable or necessary for the development of the American merchant marine and American commerce." S. Rept. No. 2755, 58th Cong., 3d sess., p. I. Congress re-

sponded with the act of April 28, 1904, 33 Stat. 561, c. 1813, which created "The Merchant Marine Commission," consisting of five Senators and five Representatives from both political parties. The commission held sessions at all the principal seaports and lake ports in the United States, at which a vast amount of testimony was taken, and reported to Congress January 4, 1905. Cong. Rec., vol. 39, pt. 1, pp. 437, 449. All of the members agreed that the existing policy of shipping reciprocity was at the root of the evil. The only division was as to the remedy. A majority recommended the granting of subsidies to countervail the subsidy policy of foreign nations, while the minority proposed abrogation of the treaties and imposition of discriminating duties. S. Rept. No. 2755, 58th Cong., 3d sess., pp. I, LIII; Cong. Rec., vol. 50, pt. 5, p. 4499. The bill recommended by the majority failed because of a general public sentiment against the granting of subsidies, and the proposal of the minority became the policy of those of the Sixty-third Congress, who inspired the subsection in question.

It was charged against the long-continued policy of reciprocity that it had been subverted by the foreign powers to their own advantage. They had very cleverly nullified their own obligations to maintain shipping equality by granting ship subsidies, while preventing our abrogation of the treaties and reciprocity laws by inducing the fear

of retaliation. Mr. Gallinger, the former chairman of the Merchant Marine Commission, said, referring to the committee report when this subsection was under consideration in the Senate (Cong. Rec., *id.*, pt. 5, p. 4499):

> It may be said in passing that when Great Britain and other foreign nations secured the commercial agreements to which I have alluded, they very cunningly nullified to a large extent their obligations under the agreements by granting subsidies to their vessels engaged in the foreign trade.

In order to exhibit the condition of American shipping as it was seen by Congress, it is necessary only to refer to the statistics for the year ending June 30, 1913 (Com. and Nav., p. 869), showing that of 3,081 vessels plying that year in the trade from Europe to America only 67 were under the American flag.

As stated by the Merchant Marine Commission in a memorandum quoted for the information of Congress during the debate on the present act (Cong. Rec., *id.*, pt. 5, p. 4499), "an American vessel, even direct from the United States, is seldom seen now in European waters."

That the decline of American shipping was progressive also appeared to Congress. As the minority opinion of the Court of Customs Appeals puts it (R. 91):

> * * * In 1795, 92 per cent of our imports and 88 per cent of our exports were so

carried; in 1826, 95 per cent of our imports and 89.6 per cent of our exports; in 1830, 93.6 per cent of our imports and 86.3 per cent of our exports; in 1845, 87.3 per cent of our imports and 75.3 per cent of our exports; in 1860, 63 per cent of our imports and 69.7 per cent of our exports; in 1870 American ships carried 35.6 per cent of our foreign trade, which has gradually declined to 9.4 per cent in 1912 and 8.7 per cent in 1913.

This was the deplorable condition of the American merchant marine. It called—so thought those who favored the act—for a change of policy; a change from the old policy of reciprocity in favor of foreign vessels to a new policy of real discrimination in favor of American ships. Attention was called again and again to the growth and development of our marine in the early days under a policy of discriminating duties and to its subsequent decline coincident with, if not caused by, the abandonment of that policy. There was no hint of any desire to aid the shipping of any foreign nation; nor was Congress actuated by any altruistic motives toward our commercial rivals. There was no design to benefit the American merchant marine and its competitors alike; but boldly to assist the former by the specific method of discriminating duties at the expense, if need be, of the latter, any treaties to the contrary notwithstanding.

2. The Senate was equally determined to brook no disturbance of existing treaties.

The tariff bill containing this subsection in the form above given passed the House on May 8, 1913 (Cong. Rec., *id.*, pt. 2, p. 1387), was transmitted to the Senate, and referred to its Committee on Finance on May 16. That committee struck out the clause in question and reported the bill to the Senate with the following explanation of its action (Cong. Rec., *id.*, pt. 3, pp. 2506, 2507, 2515):

> Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent on all duties upon goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had the treaties. In our opinion it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover, the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were therefore not only inviting an endless retaliation but a retaliation where our

opponents would have had in nearly every case the better of it, and in many cases infinitely the better.

No little debate ensued. A resolution was adopted (S. Res. No. 165, 63d Cong., 1st sess., Cong. Rec., *id.*, pt. 4, p. 3494) calling upon the Secretary of State to transmit copies of all objections or protests made by foreign nations against the adoption of the paragraph as enacted by the House, and such documents were transmitted. S. Doc. No. 179, 63d Cong., 1st sess., Cong. Rec., *id.*, pt. 5, p. 4237. It appeared that there were some 20 or more countries with which we had treaties, of which 10 or 11 had already protested to the Secretary of State. Cong. Rec., *id.*, pt. 5 ,p. 4498. The letter of the Secretary of State was accompanied by one written by Counselor Moore, of the State Department, to the Secretary of the Treasury. It appeared that the latter officer had called the attention of the Secretary of State to the pending provision, saying:

> It has been pointed out to me, directly and indirectly, that this provision may result in the violation of many of our treaties with foreign nations, and is almost sure to result in international complications and diplomatic negotiations. Consequently, I earnestly suggest the advisability of submitting to the counselor for the State Department or such other officer as you may deem proper the question as to whether or not this provision is in violation of any existing treaty rights. [Letter of the Secretary of the Treasury May 26, 1913; Cong. Rec., *id.*, pt. 5, p. 4237.]

In response to this inquiry Counselor Moore called attention to the treaties hereinbefore enumerated and said (Cong. Rec., *id.*, pt. 5, p. 4237):

> The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels.

The then Solicitor for the Department of State, Mr. Folk, writing to the Chairman of the Finance Committee of the Senate, said (Cong. Rec., *id.*, pt. 6, pp. 5345, 5346):

> * * * Presuming that the effect of the enactment into law of the provision granting to importations in vessels of the United States a discount of 5 per cent on the duties levied by the act would be to permit the entry of goods imported in American vessels at a lower rate of duty than that charged on the same kind of goods imported in foreign vessels—a judicial question—then there would seem to be no question that the result would be a violation of treaty provisions, such as those above referred to, obligating this Government not to impose on the cargoes of the foreign vessels higher or other duties than those imposed on the cargoes of its own vessels.

The effect upon the treaties was further emphasized by adducing memoranda from the report of the Merchant Marine Commission on the policy of discriminating duties, which was incorporated in the Record (Cong. Rec., *id.*, pt. 5, p. 4499), stating that—

> * * * In the first place, there were the 30 commercial treaties with foreign Governments—the very foundation of our modern commercial relations—which prohibit both discriminating custom duties and discriminating tonnage dues. These treaties of course could be abrogated, but notice of this would have to be given a year in advance, and new treaties without a discriminating duty clause negotiated on terms as favorable as before.

Mr. Jones was the especial champion in the Senate of the provision as it came from the House. In discussing the conditions which enlisted his support of the bill, he said (Cong. Rec., *id.*, pt. 5, p. 4494):

> In 1885 our ships carried $194,865,743 of our foreign trade, while foreign ships carried $1,274,384,309 or six times as much. In 1913 our ships carried $378,234,924, while foreign ships carried $3,375,284,022, or nearly ten times the amount carried in our own ships. * * *
>
> Not only is this condition of things humiliating and unprofitable, but it is actually dangerous. British ships transport the greater

part of our foreign commerce. Suppose England should engage in a war with a great power. Thousands of her ships would be taken for transports and other thousands might be destroyed. Our foreign commerce would be destroyed, and the products we now send abroad would be left on our hands, glutting our markets and bringing upon us industrial ruin and widespread commercial disaster.

He continued (p. 4495):

Why is it that our merchant marine is no more? Why was it that from 1826 down to the beginning of the Civil War our share of our carrying trade grew steadily less?

The answer is plain to me. The legislation of the fathers had been so successful in promoting our shipping trade and industry that our people came to the conclusion that we could command the seas against any competitor, and so in 1815 a treaty was entered into with England reciprocally removing the discriminating duties on goods brought into each country in the ships of the other and similar treaties were made with other countries. These treaties were usually made for a definite time and afterwards renewed to continue in force until abrogated by either party after a year's notice, the right of abrogation being expressly reserved to each party. Our shipping had received such an impetus from the encouragement given by the legislation of the fathers that it more than held its own, and in 1828 Congress

> passed an act which reads as follows: [An Act providing for reciprocal immunity from discriminating duties. See R. S., sec. 4228].
>
> * * * * *
>
> This act not only permitted the ships of a nation to bring in the products of that nation, but also the products of all other nations free from discriminating duties;

and he submitted a table showing the gradual decline of the American carrying trade.

He was fully conscious of the conflict between the proposed policy and existing treaties, but undeterred by it he offered the following substitute for the words agreed to be stricken out (Cong. Rec., *id.*, pt. 5, p. 4494):

> J. Subsection 7. That upon all goods, wares, and merchandise imported under the provisions of this act in vessels not built or not registered prior to the passage of this act under the laws of the United States, there shall be imposed and collected a duty of 10 per cent ad valorem in addition to the duties otherwise imposed by this act, and on such goods, wares, and merchandise as are otherwise admitted free there shall be imposed and collected a duty of 5 per cent ad valorem if imported in vessels not built or not registered under the laws of the United States: *Provided*, That the President is directed to cause to be abrogated without unnecessary delay, and in the manner therein provided, all treaties which contravene this provision;

and, until so abrogated, this provision shall not apply to goods, wares, and merchandise imported in vessels affected by such treaties.

In continuing the discussion, Mr. Williams, speaking in defense of the action of the Committee on Finance, said (Cong. Rec., *id.*, pt. 5, p. 4501):

> It is true that to some extent the committee was persuaded by the fact that the United States had 29 treaties with 29 different countries, pledging its word of honor to a certain policy with regard to equality of admission of ships and equality of treatment of imports coming in foreign ships with imports coming in our own. We thought we should be showing very scant courtesy to these 29 nations if, without the notice of abrogation provided in these treaties, we merely repealed the treaties by an act of Congress. But that was not our main purpose at all, because we could have reported an amendment to the bill providing for notice of abrogation.
>
> The main reason was this: We knew, everybody knew, anybody of common sense might know, that if we said to France, to Germany, to Great Britain, to the balance of the world, "We are going to reduce our import duties 5 per cent when articles come to our country in our bottoms," they would have said, "Well, we will do the same thing when your exports come to our country in our bottoms as our imports." In other words, there would have been an endless retaliation, which would have amounted to no good to anybody.

The proposed substitute was accordingly rejected (Cong. Rec., *id.*, pt. 5, p. 4548), and thereupon Mr. Jones proposed a further amendment, adding to the subsection as it passed the House the following:

> *Provided,* That the President is directed to cause to be abrogated without unnecessary delay, and in the manner therein provided, all treaties which contravene this provision; and, until so abrogated, this provision shall not apply to goods, wares, and merchandise imported in vessels affected by such treaties.

This amendment likewise the Senate rejected, and then, upon a yea-and-nay vote, agreed to the amendment reported by the committee striking out the entire clause.

It is apparent, therefore, that the Senate was fully persuaded that the language of the House could be interpreted only as in violation of existing treaties. It regarded itself no doubt as the peculiar guardian of our treaty relations, and for this reason, among others, refused to concur in the manifest design of the House.

3. The conference committee vainly endeavored to harmonize these divergent and wholly irreconcilable purposes.

There was thus, when the bill went to conference, a hopeless disagreement between the House and Senate; one insistent that a discrimination should be made in favor of American vessels, with the consequent impairment of treaty obligations; the other

equally determined that treaty obligations should not be so abrogated, impaired or affected.

Subsection 7, as enacted, is in no sense an adjustment of this difference; on the contrary it merely gave voice to the deadlock without pretending to solve it.

In the form in which it now appears, it was reported to both Houses by the conference committee on September 30, 1913. Cong. Rec., *id.*, pt. 6, pp. 5222, 5227. The conference committee sought to recognize the views of the House and incorporated in the purview of the subsection the exact wording of the House. At the same time it endeavored to express the irreconcilable purpose of the Senate by adding the words—

> *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Nothing was stated in the report of the conference committee to either house as to the meaning of this proviso, or what was intended to be accomplished by it. The subject of tariff revision had been long before Congress and the country, the time for action had come, and the adoption of the conference report followed in the House immediately upon its submission on the 30th day of September, and in the Senate on the 2d day of October. The debate on its adoption was perfunctory. This particular clause, however, did not escape criticism.

Mr. Penrose, speaking for the minority in the Senate, said (Cong. Rec., *id.*, pt. 6, p. 5343):

> I also observe with great regret, Mr. President, that the 5 per cent reduction on goods brought here in American vessels in the House bill and stricken out in the Senate was not put back in conference. It is said that this was done because the treaties must not be impaired. It seems to me that this is a judicial question, and we might well have taken this step in the interest of American shipping and ascertained later on whether it would hold or not.

Mr. Payne, speaking for the minority in the House, said (Cong. Rec., *id.*, pt. 6, p. 5237):

> * * * They had a provision in the bill of a discount of 5 per cent duty on goods brought in in American ships. Well, I told the House I thought that might be a good provision, but that would not work, because it abrogated all the treaties. That went in, it went over to the Senate, and they considered it and then struck it out. The conferees have agreed to it with a proviso that absolutely destroys the force of it.
>
> They provided that it shall not abrogate or impair any treaty. Now you see it and now you do not see it.

So, in the effort at legislative accommodation, there was added to the wholly unambiguous language of the House a proviso which sought, under the guise of a rule of construction, to declare the directly hostile purpose of the Senate.

A discussion of the resulting *impasse* may well be prefaced by the language of Mr. Justice Holmes in *United States* v. *Plowman*, 216 U. S. 372, 375:

> * * * It is not unknown, when opinion is divided, that qualifications sometimes are inserted into an act that are hoped to make it ineffective.

II.

THE SUBSECTION IS VOID BY REASON OF THE IRRECONCILABILITY OF ITS MAIN CLAUSE AND PROVISO; OR AT LEAST IS WITHOUT PRESENT FORCE OR EFFECT.

The legislative history of the subsection demonstrates that it is the mere expression of a legislative deadlock. The legal result of the terms used is what one would naturally expect. The subsection would be quite as intelligible if it read:

> *Be it enacted, &c.,* That existing treaties of commerce and navigation are hereby abrogated: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any such treaty.

The respect properly due the legislative branch of the Government can not be permitted to blind the eyes of the judiciary to things as they are. A bicameral legislature, like every other governmental institution, has its weaknesses as well as its strength. The checks of one body upon the other can not operate to prevent hasty and ill-advised legislation without at times defeating legislation

that may be desirable. The necessity for a compromise of conflicting views may lead the way to that moderation which is the surest line of progress. Or, again, it may prove that in an effort at compromise the proposed statute has been emptied of all force and power. Such is the case at bar.

In answer to the Government's assertion that the act is of no effect emphasis is laid upon the familiar rules that the legislature is not to be presumed to have done a futile thing, and that courts in the interpretation of statutes must adopt, if possible, that construction by which the statute will prevail and not fail. Accordingly the claimants insist that the act must be interpreted, after the fashion of the Board of General Appraisers, as allowing a discount to goods in American vessels alone, or, preferably, in accord with the Court of Customs Appeals, as extending the same favor to all goods in either American or treaty-nation bottoms.

The canons of construction relied upon are of course well established, but they are controlled in this instance by others of greater force. The construction adopted must be one founded upon the language employed in the statute, and it must do no violence to the intent of the legislature if that be ascertainable. Anything other than this is not interpretation but judicial legislation. It is submitted that both the one and the other of the constructions proposed must fail by these tests.

1. The discount can not be allowed to goods in American vessels alone, because, so construed, the subsection would abrogate, impair or affect the provisions of existing treaties.

During the formative stages of this subsection the House, the Senate, the legal officers of the Department of State, and the diplomatic representatives of treaty powers, all, as we have seen, evidenced their conviction that a discriminatory grant to goods in American vessels alone would abrogate or impair existing treaties. The Attorney General so ruled, and the Court of Customs Appeals has so decided. The only dissenting voice is that of the Board of General Appraisers, who, holding the treaties to be not self-executing, and indeed unconstitutional, declared their observance or nonobservance a political question beyond judicial cognizance, and who, therefore, thought it possible to ignore the treaties and enforce a discount in favor of goods in American vessels, the proviso to the contrary notwithstanding.

In the discussion by court and counsel which these cases have hitherto provoked much has been said of the character of these treaties, as either self-executing or executory, and various conclusions have been deduced from the one or the other premise. A discount granted to American vessels alone would seem in either aspect of the matter to be obnoxious to the language of the proviso—

> That nothing in this subsection shall be so construed as to abrogate or in any manner

impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

The Government therefore conceives that the definition of the treaties is after all immaterial, although it is convinced that they are in character purely promissory. The extent, however, to which this phase of the matter has been heretofore discussed warrants, at the cost of digression, some enlargement upon the topic at this time.

a. If self-executing, the treaties would be abrogated or impaired by such a grant.

Even if the treaties were self-operative, could it be argued that immediately upon a legislative grant of discriminating duties to goods in American vessels there would follow from the treaty *proprio vigore* a like grant to goods in treaty bottoms? Obviously this argument would beg the entire question. Do not the treaties promise equal *legislative* treatment to goods in domestic and treaty bottoms alike? If so, does not a law which grants to goods in domestic bottoms a special privilege clearly and expressly violate this promise?

Granting to a self-executing treaty the force of municipal law, there still remains the well-settled power of Congress to abrogate or impair it by a later act inconsistent with its terms. Though a treaty and a statute are presumed not to be in conflict until the contrary clearly appears, yet where an act passed subsequent to a treaty is plainly inconsistent with

the latter the latest expression of the legislative will must prevail, and the treaty is *ipso facto* annulled. *Taylor* v. *Morton,* 2 Curtis, 454; *Cherokee Tobacco Case,* 11 Wall. 616; *Head Money Cases,* 112 U. S. 580; *Whitney* v. *Robertson,* 124 U. S. 190; *Chae Chan Ping* v. *United States,* 130 U. S. 581; *United States* v. *Lee Yen Tai,* 185 U. S. 213; *Hijo* v. *United States,* 194 U. S. 315; *Sanchez* v. *United States,* 216 U. S. 167; *Rainey* v. *United States,* 232 U. S. 310.

Even a statute insuring equal treatment to foreign and domestic vessels would fall before a later act granting special privileges to domestic vessels only. These treaties, though conceded for the sake of argument to be self-operative and to have the force of municipal law, are in no better case.

b. The treaties are, as a matter of fact, not self-executing but executory; nevertheless, Congress did not design to contravene them.

It is clear, on both reason and authority, that the treaties under discussion are in fact not self-executing, but are merely executory promises, binding upon the legislative branch of the Government. The language of the treaty with Austria-Hungary, which is quoted above, is:

> * * * may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination levied in the name, or to the

> profit of the Government, the local authorities, or of any private establishments whatsoever;

or in the slightly different but equivalent phraseology of the Italian treaty:

> * * * no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other.

This is the language of contract; and since the power to levy and collect duties is vested in Congress, and in Congress alone, the contract is one whose fulfillment is addressed solely to that body. In the familiar language of the Chief Justice in *Foster* v. *Neilson*, 2 Pet. 253, 313:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished; especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to per-

> form a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

The treaties at bar fall within the class last enumerated. Their covenants are observed, in a negative sense, so long as Congress refrains from enacting any discriminatory tariffs. In the affirmative, they are to be performed by a repeal of such discriminatory tariffs as may have existed at the time of their ratification. Action and inaction alike rest with the legislative branch.

Congress has given abundant evidence that this is its own conception of the matter. For instance, when the reciprocal treaty of 1815 with Great Britain was ratified there was, as pointed out above (*supra*, p. 17), a statute imposing an additional duty of 10 per cent on all importations in foreign vessels. Congress perceived that the maintenance of this discrimination was inconsistent with the treaty, and that the treaty did not work of itself a repeal of the statute. Accordingly it passed the act of March 1, 1816, 3 Stat. 255, c. 22, in the following language:

> * * * That so much of any act as imposes a higher duty of tonnage, or of impost on vessels and articles imported in vessels of Great Britain, than on vessels and articles imported in vessels of the United States, contrary to the provisions of the convention be-

> tween the United States and his Britannic majesty, the ratifications whereof were mutually exchanged the twenty-second day of December, one thousand eight hundred and fifteen, be, from and after the date of the ratification of the said convention, and during the continuance thereof, deemed and taken to be of no force or effect.

Similar legislative action was taken subsequent to the convention with France of 1822 by the act of March 3, 1823, 3 Stat. 747, c. 25, which repealed the inconsistent act of May 15, 1820, 3 Stat. 605, c. 126, and enacted the rates agreed to in the convention. See also act of May 6, 1822, 3 Stat. 681, c. 56, sec. 2. This treaty had been sent to the House on February 20, 1823, in order to adopt "the necessary measures for carrying it into execution." Am. St. Papers, vol. 5, For. Rel., p. 222. Again, the treaty with France of 1831, Article 7, 8 Stat. 430, 432, provided for duties on French wines less than those of the existing tariff act of May 24, 1828, 4 Stat. 309, c. 113. Congress deemed it necessary to enact the lower treaty rates and provided that they should have effect retroactive from the date of exchange of ratifications. Act of July 13, 1832, sec. 10, 4 Stat. 574, 576, c. 199.

The operation of certain subsequent treaties looking toward the modification of existing tariff schedules has been by express clauses made contingent upon the action of Congress. Treaty with Great Britain of June 5, 1854, Article 5,

10 Stat. 1089, 1092 (see act of August 5, 1854, 10 Stat. 587, c. 269; act of March 2, 1855, 10 Stat. 632, c. 144); treaty with Great Britain May 8, 1871, Article 33, 17 Stat. 863, 874 (see act of March 1, 1873, 17 Stat. 482, c. 213); convention with Hawaii January 30, 1875, Article 5, 19 Stat. 625, 627 (see act of August 15, 1876, 19 Stat. 200, c. 290); treaty with Cuba of December 11, 1902, 33 Stat. 2136, 2143 (see act of December 17, 1903, 33 Stat. 3, c. 1). As is said in Crandall, Treaties, their Making and Enforcement (p. 145):

> From this historical review it appears that whatever may be the *ipso facto* effect of treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress.

See also Butler on Treaty-Making Power of the United States, vol. 2, chapter 12; Willoughby on Constitution, sec. 209.

Having in mind the negotiation of other treaties similar to that of 1815 with Great Britain, and perceiving that such a treaty of itself would not work a repeal of outstanding statutes, Congress made general provision for this contingency by such acts as those of March 3, 1815, 3 Stat. 224, c. 77, January 7, 1824, 4 Stat. 2, c. 4, and May 24, 1828, 4 Stat. 308, c. 111, the latter of which has persisted to this day and is now upon the statute books, with slight

modifications, as section 4228 of the Revised Statutes. (*Post*, p. 71.) These acts empower the President to suspend as to any particular nation discriminating duties when satisfied that the nation in question no longer discriminates against the United States. In still other instances, Congress, when imposing discriminatory duties, has expressly exempted goods covered by treaty. (*Post*, pp. 51 *et seq.*, 70.) It is by force of these and similar statutes and not of the treaties *proprio vigore* that such discriminating duties as have been embodied in later acts have not been collected upon goods arriving in vessels of those nations which, either by treaty or by custom, do not discriminate against the United States.

The question has been directly decided. In the leading case of *Taylor* v. *Morton*, 2 Curtis, 454, there was considered the commercial treaty with Russia of December 18, 1832, 8 Stat. 444, 446, Article VI of which provided:

> No higher or other duties shall be imposed on the importation into the United States, of any article, the produce or manufacture of Russia * * * than are, or shall be, payable on the like article, being the produce or manufacture of any other foreign country.

It was contended that this treaty was self-operative and extended *proprio vigore* to importations of Russian hemp a preferential rate of duty granted by statute to hemp imported from India.

Mr. Justice Curtis, then on circuit, held to the contrary, saying (p. 462):

> The truth is, that this clause in the treaty is merely a contract, addressing itself to the legislative power. The distinction between such treaties, and those which operate as laws in courts of justice, is settled in our jurisprudence.

This case was affirmed by this court in 2 Black, 481, merely, however, on questions of procedure; but it has been uniformly cited and relied upon in matter of principle in the numerous cases which have since arisen involving a similar question. See *Whitney* v. *Robertson*, 124 U. S. 190, 194; *Rainey* v. *United States*, 232 U. S. 310, 316.

There is nothing to the contrary in the case of *Oldfield* v. *Marriott*, 10 How. 146, cited and relied upon in the majority opinion of the Court of Customs Appeals. Nor does that case, as therein supposed, involve in any way an assumption that treaties such as those under consideration are self-executing in character. The court was there considering the language of the tariff act of July 30, 1846, 9 Stat. 42, 49, c. 74, which exempted from duty—

> * * * coffee and tea, when imported direct from the place of their growth or production, in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges * * *.

The sole question, as stated by Mr. Justice Wayne in delivering the opinion, was whether under the treaty with Portugal the vessels of that nation fell within the clause described. If so, their cargoes were entitled to free entry, not by force of the treaty, but by force of the statute itself. This issue was found against the importer.

So in the case of *Olsen* v. *Smith,* 195 U. S. 332, in which also the Court of Customs Appeals sought to find support for its theory of the self-executing character of these treaties. The case involved a Texas statute concerning pilotage, which made certain exemptions to vessels in the coasting trade. The court went so far only in the consideration of the asserted conflict between the statute and the treaty with Great Britain as to point out that the provision of the latter for reciprocal treatment had to do solely with vessels in the foreign and not in the coasting trade; and therefore, without more saying, it dismissed the subject, which was in fact quite subsidiary to the main issues.

But though the treaties are executory and not self-executing, it does not follow, as the Board of Appraisers held, that they are to be ignored by the courts in the present instance. On the contrary, by the proviso which the conference committee added to this subsection, Congress has in terms admonished the courts "that nothing in this subsection *shall be so construed* as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any

foreign nation." There is of course no doubt that Congress well knew what the treaties were to which it had reference and that it did not pause to concern itself with any consideration of their character. It is obvious that it did not intend or desire to contravene them. The proviso can be read only as a declaration of its intent to forego any such result. If to the plain and explicit words of the main clause granting a preference to American vessels, there can be given no meaning not in conflict with treaty promises, it follows that the subsection is *ex vi termini* inoperative.

There is no escape therefore from the conclusion that the discount can not be allowed at this time to goods in American bottoms alone.

2. The discount can not be allowed to goods in both American and treaty vessels. Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed.

When we turn to the alternative suggestion of allowance upon goods in both American and treaty vessels we confront obstacles which are certainly no less serious. This reading will be found upon consideration to be not only without support in the language employed, but foreign to any and all purposes which Congress had in view.

a. The language of the act does not support the construction suggested.

We search the subsection in vain for any language which in terms confers this discount upon

goods in vessels of both classes. Yet a favor of this sort to foreign as well as to domestic vessels is of such far-reaching consequence, it affects so largely the national revenues, the language by which it may be accomplished is capable of such definite and exact statement, and, as we shall see, was so familiar to the legislative mind, that no just rule of construction would tolerate such a grant by mere implication. *Interstate Commerce Commission* v. *Cincinnati etc. Ry. Co.*, 167 U. S. 479, 495. There are peculiar reasons for adhering to this principle in the present instance.

The proviso was not intended to enlarge the operation of the discount clause, but, on the contrary, to restrict it.

The enacting clause of the subsection reads as follows:

> That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

There can be no mistake about the meaning of these words: Rates of duty have been specifically fixed; a discount from these rates is allowed to goods in American vessels only.

The proviso contains no words of enlargement. It simply adds that "nothing in this subsection," *i. e.*, in the antecedent enacting clause, "*shall be so construed* as to abrogate or in any manner impair or affect the provisions of any treaty." This

purports to be merely a rule of construction, and the courts are directed by it to lay the main clause of the subsection alongside the treaties and give to the main clause no interpretation which is in conflict with the promises of the latter. The language is nothing more, as has been said, than a declaration disclaiming any intention to do that which the discount clause would otherwise have accomplished, namely, a contravention of treaty provisions. It says, in effect, that the discount clause shall operate provided it does not contravene any treaty; and, conversely, that it shall not operate if it does. *Austin* v. *United States,* 155 U. S. 417, 431, and cases cited.

It is true that a proviso which in form does not contain words of enlargement may be given that effect, not, however, as a proviso, but as an independent item of legislation wherein the word "provided" is used as the equivalent of "but" or "and" in order to distinguish the different paragraphs or sentences. *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 37. But in the present case the proviso was obviously intended to perform the usual office of a proviso, which is to "limit and restrict the operation of the enacting clause." *Patterson* v. *Winn,* 11 Wheat. 380, 388; *Voorhees* v. *The Bank of the United States,* 10 Pet. 449, 471; *United States* v. *Dickson,* 15 Pet. 141, 165; *Minis* v. *United States,* 15 Pet. 423, 445; *Georgia Banking Co.* v. *Smith, supra; Austin* v. *United*

States, supra; Quackenbush v. *United States,* 177 U. S. 20, 26; *White* v. *United States,* 191 U. S. 545, 551; *Pennington* v. *United States,* 231 U. S. 631, 637, 638.

Upon the argument in the court below attention was called by counsel for the importers to section IV, paragraph B, of the tariff act of 1913, which provides:

> That nothing in this Act contained *shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty* of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed. [Italics ours.]

The similarity in phraseology between the italicized language of this paragraph and that of the proviso under consideration was pointed out, and it was insisted that the function which appellees ascribe to the latter proviso is identical with the function performed by this paragraph B.

It is clear, as we think, that in this counsel were mistaken. On the contrary, precisely the reverse is true, for the clause quoted is purely restrictive, performing the normal and typical office of a proviso, and does not serve in any way to enlarge that which precedes it. Section IV, para-

graph B, excludes from the general operation of the tariff act of 1913 those subjects covered by the Cuban treaty and the statute passed pursuant thereto, being as to the latter a typical clause of nonrepeal. It was designed to carve out of a class described in general terms a smaller class identified by reference to an antecedent statute or treaty. The clause is not designed to insert into or add to a class previously defined those not otherwise within the language used. In short, the difference between this Cuban clause and the proviso at bar *as the latter is construed by the appellees* is that between limitation and extension, restriction and expansion, exception and inclusion, subtraction and addition. The court is asked to hold that language substantially similar can be used in section IV, paragraph B, to restrict general terms, and in paragraph J, subsection 7, of the same act to enlarge a specific grant. We submit, on the contrary, that the function is indeed the same in each case and in both purely restrictive.[1]

In order to hold, as did the court below, that the instant proviso operates to enlarge the discount clause, words of enlargement would have to be introduced into it, in violation of the established rule that language necessary to carry out an unexpressed legislative intent can not be supplied.

[1] The same thing may be said of like language in the acts of March 27, 1804, 2 Stat. 299, c. 57, sec. 6; February 5, 1816, 3 Stat. 253, c. 10, sec. 3; and January 14, 1817, 3 Stat. 344, c. 3, sec. 1, which were cited by counsel for a similar purpose.

"When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe." *Hobbs* v. *McLean*, 117 U. S. 567, 579.

See also to same effect: *United States* v. *Union Pac. R. R. Co.*, 91 U. S. 72, 85; *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 36; *United States* v. *Goldenberg*, 168 U. S. 95, 103; *Dewey* v. *United States*, 178 U. S. 510, 521; *United States* v. *First National Bank*, 234 U. S. 245, 262.

It must be remembered in this connection that the discount clause is itself an exception to the general law, made in favor of American vessels. The rule against supplying language omitted by design or mistake would seem to be conspicuously applicable in such a case. The failure to except, *eo nomine*, any other than American vessels from the general rates of duty is tantamount to a declaration that all other vessels shall be governed by the general law. *Bend* v. *Hoyt*, 13 Pet. 263, 271, 273; *Taylor* v. *Morton*, 2 Curtis, 454, 461–462; *Hobbs* v. *McLean*, *supra*; *Whitney* v. *Robertson*, 124 U. S. 190, 193–194.

The discount is, pro tanto, an exemption from taxation. Such exemptions are not to be raised or extended by implication.

Furthermore, the discount granted in favor of American vessels is, to the extent of the discount, an exemption from the normal rate of import duty.

An exemption from taxation is never to be implied. In order to exist it must appear from express language and so clearly as to leave no room for controversy. *Bailey* v. *Magwire,* 22 Wall. 215, 226; *Central Railroad & Banking Co.* v. *Georgia,* 92 U. S. 665, 674; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134; *Ford* v. *Delta and Pine Land Co.,* 164 U. S. 662, 666 *et seq.; Metropolitan Street Ry. Co.* v. *New York,* 199 U. S. 1, 36; *Morris Canal Co.* v. *Baird,* 239 U. S. 126, 133. It can not be said that the language of this statute was intended, beyond question, to grant an exemption to foreign vessels.

Congress was fully advised of the apt words proper to accomplish an extension of the grant, and declined to use them.

Why did Congress refrain from the use of simple and direct language to express with precision that which is now sought to be implied from the restrictive proviso? If apt language was familiar in tariff legislation, the reason must be that Congress did not intend to accomplish the result which would have been attained by use of the familiar terms. *United States v. First National Bank, supra,* p. 50.

The first tariff act proposed after the United States had definitely embarked on its policy of shipping reciprocity was the act of April 27, 1816, 3 Stat. 310, 313, c. 107, section 3 of which reads as follows:

> That an addition of ten per centum shall be made to the several rates of duty above

> specified and imposed, in respect to all goods, wares, and merchandise, on the importation of which in American or foreign vessels a specific discrimination has not been herein already made, which, after the said thirtieth day of June, one thousand eight hundred and sixteen, shall be imported in ships or vessels not of the United States: *Provided*, That this additional duty shall not apply to goods, wares and merchandise, *imported in ships or vessels not of the United States, entitled by treaty, or by any act or acts of Congress, to be entered in the ports of the United States, on the payment of the same duties as are paid on goods, wares and merchandise, imported in ships or vessels of the United States.* [Italics ours.]

This proviso or its equivalent was subsequently reenacted in connection with each succeeding similar discrimination until 1846. 3 Stat. 458, 459; 4 Stat. 25, 29; *id.* 583, 592; 5 Stat. 548, 561.

From 1846 to 1861 no additional duty was imposed on importations in foreign vessels, but exemptions from duty were allowed on coffee and tea imported in American vessels, and the exemption was in each case expressly extended to the vessels of reciprocal treaty nations. The free list of the tariff act of July 30, 1846, 9 Stat. 42, 49, c. 74, contained the following:

> * * * coffee and tea, when imported direct from the place of their growth or production, in American vessels, *or in foreign*

vessels entitled by reciprocal treaties to be exempt from discriminating duties * * *. [Italics ours.]

This provision was subsequently reenacted in the act of March 3, 1857, 11 Stat. 192, 194, c. 98, and the act of March 2, 1861, 12 Stat. 178, 193, 194, c. 68.

The tariff act of August 5, 1861, 12 Stat. 292, 293, c. 45, sec. 3, provided:

> That all articles, goods, wares, and merchandise, imported from beyond the Cape of Good Hope *in foreign vessels, not entitled by reciprocal treaties to be exempt from discriminating duties,* tonnage, and other charges, and all other articles, goods, wares, and merchandise not imported direct from the place of their growth or production, *or in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties,* tonnage, and other charges, shall be subject to pay, in addition to the duties imposed by this act, ten per centum ad valorem: *Provided,* That this rule shall not apply to goods, wares, and merchandise imported from beyond the Cape of Good Hope in American vessels. [Italics ours.]

Section 17 of the tariff act of June 30, 1864, 13 Stat. 202, 215, c. 171, reads as follows:

> That a discriminating duty of ten per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, and merchandise which, on and after the day this act shall take

effect, shall be imported in ships or vessels not of the United States: *Provided,* That this discriminating duty shall not apply to goods, wares, and merchandise which shall be imported, on and after the day this act takes effect, *in ships or vessels not of the United States, entitled, by treaty or any act or acts of Congress, to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in ships or vessels of the United States.* [Italics ours.]

This discrimination with its proviso was subsequently reenacted without substantial change until 1897. R. S., sec. 2502; 22 Stat. 488, 491; 26 Stat. 567, 616; 28 Stat. 509, 550. The tariff act of July 24, 1897, section 22, 30 Stat. 151, 209, c. 11, contained a like discrimination and proviso, with the addition of a clause to cover importations from noncontiguous foreign countries brought in through contiguous territory. In that form the same provision was reenacted as section 15 of the tariff act of August 5, 1909, 36 Stat. 11, 87, c. 6; and in that form it appears in subsection 1 of paragraph J, section IV, of the present tariff act of October 3, 1913.

Thus we see that for nearly a century Congress had used definite and practically uniform language to describe those foreign treaty vessels to which it desired to extend the same exemptions and privileges enjoyed by vessels of the United States. Never at any time did it resort to a proviso like

that under consideration for the purposes of such description. Indeed, simultaneously with the passage of this very subsection 7 it used in the same section of the present tariff act (sec. IV, J, subsection 1) the familiar phraseology which it had theretofore employed. Must it not be concluded that the absence of such language from subsection 7 was deliberate and intentional, and that if Congress had in fact desired to extend this discount to both American and treaty vessels it would have cast the subsection in the following form:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States, *or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties;*

or as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States, *or in ships or vessels not of the United States entitled by treaty to be entered in the ports of the United States on payment of the same duties as shall then be paid on goods, wares, and merchandise imported in ships or vessels of the United States.*

b. The proposed construction is at war with the congressional intent.

We know of no argument that can be advanced—certainly there is no authority that can be cited—to justify the introduction into a statute of language deliberately omitted which is plainly contrary in effect to the language actually used. Whatever may justify the addition of language, such a course must lack all semblance of merit unless demanded by a clear showing of the legislative intent.

In entering upon this branch of the discussion, the position of the Government must not be misunderstood. It does not yield its contention that in employing the terms of subsection 7 as reported from the conference committee Congress disclosed its positive intent that the 5 per cent discount should be allowed in no case if such allowance to goods imported in American bottoms would impair an existing treaty; that the language permits no other reading; and that there is a distinction in this respect between the ultimate intent which the act expresses and the motive of those who initiated it.

This motive, as hereinbefore shown, was to confer some substantial benefit upon American vessels—a fact which the majority of the Court of Customs Appeals fully recognized, holding that—

> the enactment of the subsection was the adoption of a policy of discrimination in favor of American vessels.

Accepting this as the controlling purpose, the court conceived that it would be served by allowing the discount to both American and treaty vessels. Their interpretation accordingly is dependent upon a showing of some substantial benefit to American ships to result from the act as so construed. Making only such concessions as are necessary for the sake of argument, let us test the court's position by its practical results.

It is submitted that so far from serving the purpose suggested, this construction would make of the subsection not merely a confirmation, but an accentuation of the old policy of reciprocity which had worked such disaster to American shipping; that there is no field in which by the present allowance of the discount to both domestic and treaty vessels any substantial advantage to the former can accrue; that a statute so operating would lead to absurd consequences such as Congress could not have intended; and that other sections of the act place a distinct and compelling negative on such an interpretation.

To grant the discount to goods in American and treaty bottoms alike would result in no substantial benefit to the former but would be a virtual donation to shippers in the latter and a wholly useless sacrifice of revenue.

Statistics show that the discount certainly accruing to goods imported in treaty vessels many times exceeds the possible discount upon all other shipments for which American vessels might even com-

pete. The startling disproportion between this certain bounty to foreign shipping and the benefits, remote and problematical at best, to domestic bottoms is sufficient of itself to show that the court below did not correctly read the statute.

In opening this brief, attention was called to the existence of sundry statutes, executive proclamations and orders, by which the policy of shipping reciprocity embodied in the treaties had been gradually extended to the vessels of the world. These statutes and proclamations we shall shortly consider further. It suffices at present to say that, until repealed, either expressly or by implication, they extend to vessels of nontreaty nations the same favorable consideration guaranteed to others by the treaties, and lend color to the claim that the discount, if granted to any vessel, must be granted to all. This of course would make the discount absolutely coextensive with the duties, and amount to a horizontal reduction of 5 per cent on the rates of all dutiable imports. But putting this contention to one side, let us contrast the results within and without the field of express treaties. We shall find them little less startling.

For the year ending June 30, 1914, the total imports into the United States were $1,893,925,657. (Com. and Nav. for 1914, p. xiii.)[1] Of this, $156,-

[1] Page references are to Commerce and Navigation of the United States, 1914. H. R. Doc. 1670, 63d Cong., 3d session. See R. S. 336; act Feb. 14, 1903, 32 Stat. 825, 826–827, sec. 4; H. R. Doc. 1329, 63d Cong., 3d sess., p. 17.

217,004 was brought overland (Com. & Nav., *supra*, p. 299), leaving a total of $1,737,708,653 imported by sea.

The value of the imports by American steam vessels was $193,424,634 (p. 299). The value of imports by vessels of the treaty nations of Austria-Hungary, Belgium, Great Britain,[1] France,[2] Germany, Italy, Japan, Netherlands, and Norway was $890,589,097 (pp. 298–300). Thus the total value of imports by American and treaty nation vessels entitled to the 5 per cent discount is $1,084,013,731.

The total of imports in vessels for the year 1914 unprotected by treaty which would not be entitled to the 5 per cent discount, on the other hand, was $653,694,922, ascertained by subtracting the total entitled to discount, or $1,084,013,731, from the total imports in vessels, or $1,737,708,653. Of this amount $399,463,333 came in practically free of duty, as appears from the table below. Deducting the total imports practically free in vessels not entitled by treaty to the discount ($399,463,333) from the total imports in vessels not protected by treaty

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[1] The figures of British imports include only goods brought in British vessels from the United Kingdom in Europe. (Com. and Nav., 1914, p. 298.)

[2] The French figures include only goods brought in French vessels from France, p. 298. The majority of the Court of Customs Appeals held that the treaty with France did not protect French goods against discrimination (R. 64, 65). As to this, see footnote, *ante*, p. 7.

($653,694,922), we have $254,231,589 as the total value of imports the routing of which by any possibility was subject to be diverted by a grant of 5 per cent discount to the carrying vessel.[1]

The average *ad valorem* rate on the total imports for the year ending June 30, 1914, was 14.88 per cent (p. xi, Table I). The duties therefore on imports entitled to the 5 per cent discount would have been 14.88 per cent of $1,084,013,731, or $161,301,243, and 5 per cent of this amount is $8,065,062. On the other hand, the duties on the total which might by possibility, remote or otherwise, be diverted to American bottoms ($254,231,589), at the average *ad valorem* rate of 14.88 per cent, would be $37,829,660, of which 5 per cent is $1,891,483.

[1] This value of $254,231,589, embracing the total competitive field of duty paying imports, provides no deductions for importations in Spanish, Swedish, Argentinian, Chinese, Danish, Grecian, and vessels of many other treaty nations, although these carry the larger portion of the imports amounting to $47,484,340 described under the heading "all other," in Com. and Nav., 1914, pp. 299, 300, 878; nor millions of dollars of free imports from relatively unimportant countries; nor several millions of imports in sailing vessels of the treaty nations (p. 300); nor does it take into account the free importation of sugar after March 1, 1916, 38 Stat. 114, 131, sugar to the value of $98,394,782 having been imported from Cuba in 1914, on which duties were paid (p. 255). The tables make no pretense to absolute accuracy but only estimate reasonable results.

We restate this calculation in tabular form:

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1914.

Total imports (p. xiii, Com. and Nav. U. S., 1914)		$1, 893, 925, 657
Brought on cars and other land vehicles (p. 299)		156, 217, 004
Total imports in vessels		1, 737, 708, 653
Steam vessels:		
American (p. 299)	$193, 424, 634	
Austrian (p. 299)	24, 358, 126	
Belgian (p. 299)	35, 461, 566	
Dutch (p. 299)	68, 779, 035	
German (p. 299)	241, 318, 841	
Italian (p. 299)	34, 666, 994	
Japanese (p. 299)	55, 305, 703	
Norwegian (p. 300)	66, 440, 187	
British (p. 298) (goods direct from Great Britain)	271, 320, 331	
French (p. 298) (goods from France)	92, 938, 314	
Total imports in American and treaty bottoms entitled to discount		1, 084, 013, 731
Not clearly entitled to 5 per cent discount		653, 694, 922

The following imports in British vessels in the indirect trade were almost entirely on the free list:

		(p. xiv) % free.
South America (pp. 298–9):		
Argentine	$44, 515, 151	96. 75
Brazil	89, 502, 176	98. 85
Chile	22, 883, 620	97. 91
Colombia	3, 019, 960	91. 22
Peru	1, 573, 059	94. 47
Uruguay	7, 489, 234	99. 44
Russia	4, 956, 271	88. 38
Mexico	20, 203, 901	90. 38
China	24, 340, 527	81. 28
British India	48, 738, 686	78. 20
Straits Settlements	22, 654, 389	96. 33
Other British East India	8, 848, 236	91. 86
Japan	42, 983, 785	78. 70
Australia and Tasmania	12, 147, 907	94. 05
New Zealand	5, 104, 825	91. 61
Philippines	12, 660, 340	99. 93

Egypt	$12,867,635	97.06	
Trinidad and Tobago	6,489,148	97.38	
Jamaica	2,679,798	95.86	
Costa Rica	2,167,635	99.87	
Guatemala	1,361,557	99.01	
Panama	2,185,494	99.35	
			$300,463,333
Total imports, the transportation of some portion of which might by possibility be diverted to United States bottoms by the 5 per cent discount			$254,231,589
Total imports, United States and treaty bottoms (*supra*)			$1,084,013,731
Average *ad valorem* rate (p. xl)		per cent	14.88
Total duties at average rate on imports in United States and treaty bottoms			$161,301,243
Discount on same at 5 per cent			$8,065,062
Total imports in competitive field			$254,231,589
Average *ad valorem* rate		per cent	14.88
Total duties thereon			$37,829,060
Discount on same at 5 per cent			$1,891,483
Total reduction of revenues and donation for one year to existing United States and treaty ships			$8,065,062
Total possible benefit to goods in American bottoms by diverting all imports in the competitive field not clearly allowed discount			$1,891,483

A similar table for the year ending June 30, 1913, follows. It shows that the 1914 table, which covers nine months' actual operation of the 1913 tariff, is fairly representative. The average *ad valorem* rate of duties for 1912–13 was 17.69 per cent. Com. and Nav., 1914, Table I. To use this per cent instead of 14.88 per cent, the 1913–14 rate, would increase considerably the amount of duties, and consequently the sum which would be paid to treaty-nation bottoms. The average *ad valorem* rate under the

tariff of 1913 was lower than that of the previous tariff, as represented by the statistics for the year ending June 30, 1914, by about 3 per cent. But since Congress must be deemed to have considered the effect of the 5 per cent discount in relation to the duties imposed by the 1913 tariff act, it seems fairer to use the lower average *ad valorem* rate of the new act. For similar considerations the per cent of imports on the free list from nontreaty nations is taken from the 1914 figures. The rates thus are estimated as nearly as possible under the new act, and the 1913 statistics, which Congress had before it, serve as a basis by furnishing the total import values. (The page references in this table are to Commerce and Navigation of the United States, 1913.)

Results of allowance of discount to United States and treaty-nation bottoms on basis of imports and duties collected for year ending June 30, 1913.

Total imports (p. 340, Com. and Nav. U. S., 1913)		$1,813,008,234
Brought in cars and other land vehicles (p. 336)		115,346,125
Total imports in vessels		1,697,662,109
Steam vessels:		
American (p. 336)	$185,046,549	
Austrian (p. 336)	22,939,478	
Belgian (p. 336)	33,606,852	
Dutch (p. 336)	68,542,942	
German (p. 336)	223,223,085	
Italian (p. 336)	26,736,263	
Japanese (p. 336)	57,585,628	
Norwegian (p. 338)	44,854,597	
British (p. 307) (goods direct from Great Britain)	275,877,428	
French (p. 307) (goods from France)	87,961,934	
Total imports in American and treaty bottoms		1,026,374,756
Not clearly entitled to 5 per cent discount		671,287,353

The following imports in British vessels almost entirely on the free list from the same nations included in 1914 table, *supra* (p. 307):

South America:		
Argentine	$24,759,312	
Brazil	115,698,422	
Chile	23,412,450	
Colombia	2,894,763	
Peru	1,347,262	
Uruguay	2,347,984	
Russia	8,563,120	
Mexico	12,684,341	
China	24,911,219	
British India	46,800,836	
Straits Settlements	30,369,887	
Other British East Indies	9,622,726	
Japan	27,872,009	
Australia and Tasmania	9,876,287	
New Zealand	4,340,256	
Philippines	15,794,403	
Egypt	19,668,070	
Trinidad and Tobago	4,157,437	
Jamaica	2,169,890	
Costa Rica	2,137,144	
Guatemala	423,777	
Panama	1,589,859	
		$391,441,463
Total imports, the transportation of which might by possibility be diverted to United States bottoms by the 5 per cent discount		279,845,890
Total imports, United States and treaty bottoms (*supra*)		$1,026,374,756
Average *ad valorem* rate	per cent	14.88
Total duties on imports in United States and treaty bottoms		$152,724,563
Discount on same at 5 per cent		$7,636,228
Total imports in competitive field		$279,845,890
Average *ad valorem* rate	per cent	14.88
Duties thereon		$41,641,068
Discount on same at 5 per cent		$2,082,053
Total reduction of revenues and donations to existing United States and treaty ships		$7,636,228
Total possible benefit to goods in American bottoms by diverting all imports in the competitive field not clearly allowed discount		$2,082,053

Only the most robust optimist, however, could believe that this 5 per cent discount would enable American vessels to monopolize the gross total of imports in the competitive field. Such a result is manifestly impossible. The ratio, therefore, between the benefits derived by shippers in American as compared with shippers in foreign vessels must certainly be greater than that between the competitive and the protected fields. As stated by DE VRIES, J., in his dissenting opinion (R. 121):

> While it is true, as shown by the majority opinion, that owing to the great number of uncertain and indeterminable factors, it is impossible to accurately estimate the relative amount of. tonnage carried in American as compared with foreign treaty vessels that would receive the benefits of this law, as construed by the majority opinion, there is sufficient of certain factors to disclose that at least *twelve times more benefits* would accrue to foreign than to American ships, and that really all the great maritime nations of the world would share therein equally with our merchant marine.

There is no exaggeration in this statement.

A discrimination against nontreaty ships alone is not a discrimination in favor of American vessels.

The most important countries with which we have no treaties reciprocally forbidding discriminating duties are Brazil, Bulgaria, Chile, Mexico, Nicaragua, Portugal, Roumania, Russia, Uruguay,

Venezuela, and Switzerland. The effect of granting a 5 per cent discount to American ships and also to ships of treaty nations is of course to discriminate against the ships of these nontreaty countries (if perchance there are any), but it is not a discrimination which favors American ships.

The object of a discriminatory duty, be it noted, is not primarily to increase the amount of our overseas commerce, but to obtain, at the expense of those to whom we now pay freights, a relatively higher proportion of the total shipping coming to our shores. It is not designed to increase the total imports into the United States. That is determined by other factors. The purpose is that American boats shall carry a higher percentage of the total goods transported to our shores, and the nations now carrying the higher percentages shall carry relatively less.

A bounty extended alike to ships of the United States and to those of Great Britain, Germany, Austria-Hungary, Holland, Belgium, France, Italy, Norway, Sweden, Denmark, Japan, and other great commercial and maritime rivals can not be considered a discrimination *in favor* of the United States. For example, if a shipment were contemplated from Russia to the United States the 5 per cent discount granted to American vessels and to vessels of the great commercial nations might tend to prevent the vessels of Brazil, Bulgaria, Chile, Mexico, Nicaragua, Portugal, Roumania, Switzer-

land, Uruguay, Venezuela, and Russia itself from obtaining the shipment, but it would not aid the vessels of the United States to secure it. They could offer nothing which their more numerous rivals could not. The same considerations would apply to every port on the globe, for in the main the treaty provisions guarantee against discrimination based on the flag of the carrying vessel and not the port at which it is loaded. Thus the advantages of cheaper ships and cheaper labor which foreign nations now have, and which no doubt are in part at least responsible for their present prominence in our carrying trade, would continue to operate in favor of the foreign countries as against the United States, and would be simply reinforced, not counterbalanced, by the discount.

In the race for commercial supremacy a handicap of equal distance to the United States and to its better equipped commercial rivals simply operates to maintain the natural economic advantages of these competitors.

Again, if we grant the discount to American and treaty vessels alike we do not, of course, afford to American vessels the slightest advantage in trade with the treaty countries. It is to be expected, for instance, that citizens of Holland, shipping from Dutch ports, would prefer, all things being equal, Dutch to American vessels. The conduct of a German shipping from a German port, a Briton from a British, or a Frenchman from a French, would no doubt be the same.

The field, therefore, in which American and treaty vessels might compete must naturally be the trade from the widely scattered nontreaty countries. Here again American and treaty vessels are on equal terms in the matter of duties, though both are to enjoy an advantage in this respect over nontreaty vessels; but it is precisely in this field that a reduction of the rates of duty offers least attraction to shippers, for the reason that *the imports from the leading nations with which we have no such treatries are almost entirely on the free list.*

The imports from South America for the year ending June 30, 1914, amounted to $222,677,075, of which 97.33 per cent were free. Com. and Nav., 1914, Table IV, p. xiv. From the same table it appears that the imports from Brazil alone were $101,329,073, of which 98.85 per cent were free; that of the imports from Russia in Europe amounting to $20,831,184, 88.38 per cent were free; from Mexico, of the total of $92,690,566, 90.38 per cent were free; that of the total from Asia, $286,952,486, 77.57 per cent were free; of the $42,144,398 imports from Oceania 95.85 per cent were free. The imports from Europe, on the other hand, amounting to $895,602,868, were only 43.02 per cent free. It is evident that a 5 per cent discount on the duties of a very small proportion of the cargo of a liner, with a route from any or all of the nontreaty nations, must be an entirely insignificant and negligible favor, and that it could hasten in no way the growth of an American merchant marine.

There is evidence elsewhere in the act that Congress had no thought of singling out for discrimination British and French vessels in the indirect trade and ships of non-treaty countries.

It was said, nevertheless, by the court below that since there are certain vessels not protected by treaty, notably British vessels in the indirect trade, it must be assumed that the attention of Congress was centered upon them and that their mere existence furnishes an excuse for the subsection in question, since it affords some possibility, conceivable even if remote, of resultant benefit to the American marine.

Congress, however, has spoken to the contrary in no uncertain language. Other sections, not only of the same tariff act, but of the identical section and paragraph in which subsection 7 occurs, furnish intrinsic and conclusive evidence that Congress did not intend to make of these vessels a special target for its wrath.

Section IV, paragraph J, subsection 1, provides:

> That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in ves-

> sels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.

This discrimination, with the attendant exemption to vessels entitled by treaty or act of Congress to enter upon payment of the same duties as American vessels, has been incorporated from time to time, with trifling modifications, in the several tariff acts since the policy of reciprocal immunity from discriminating duties was inaugurated.[1]

The exemption covers, in addition to vessels protected "by treaty or convention," those which by "acts of Congress" are entitled to enter their cargoes on payment of the same duties as on cargoes in American vessels. What, we ask, are the foreign vessels so entitled to exemption from discriminating duties by acts of Congress? Pre-

[1] See act April 27, 1816, 3 Stat. 313, sec. 3; act April 20, 1818, 3 Stat. 459, sec. 2; act May 22, 1824, 4 Stat. 29; act July 14, 1832, 4 Stat. 592, sec. 10; act Aug. 30, 1842, 5 Stat. 561, sec. 11; act June 30, 1864, 13 Stat. 215, sec. 17; R. S., sec. 2502; act March 3, 1883, 22 Stat. 491, sec. 6; act Oct. 1, 1890, 26 Stat. 616, sec. 17; act Aug. 27, 1894, 28 Stat. 550, sec. 14; act Aug. 5, 1909, 36 Stat. 87, sec. 15.

cisely the vessels of those nations not entitled thereto "by treaty or convention." The acts of Congress referred to are those by which the policy of shipping reciprocity has been made effective as to each and all of those nations with which no reciprocal shipping treaties exist.

Attention has heretofore been called to the acts of March 3, 1815, 3 Stat. 224, c. 77, January 7, 1824, 4 Stat. 2, c. 4, and May 24, 1828, 4 Stat. 308, c. 111, and to Revised Statutes, section 4228,[1] which is of the same general character. *Ante*, p. 41. Under these statutes proclamations have from time to time been issued exempting vessels of sundry nations from discrimination. Such, for instance, was the circular issued by the Secretary

[1] "SEC. 4228. Upon satisfactory proof being given to the President, by the government of any foreign nation, that no discriminating duties of tonnage or imposts are imposed or levied in the ports of such nation upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, so far as respects the vessel of such foreign nation, and the produce, manufactures, or merchandise imported into the United States from such foreign nation, or from any other foreign country; the suspension to take effect from the time of such notification being given to the President, and to continue so long as the reciprocal exemption of vessels, belonging to citizens of the United States, and their cargoes, shall be continued, and no longer."

of the Treasury (whose act was that of the President—*Wolsey* v. *Chapman*, 101 U. S. 755, 770; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 469) on October 15, 1849, with reference to British vessels, which made the following declaration:

> First. In consequence of the alterations of the British navigation laws, above referred to, British vessels, from British or other ports, will, under our existing laws, after the first day of January next, be allowed to enter our ports with cargoes of the growth, manufacture, or production of any part of the world.
>
> Second. Such vessels and their cargoes will be admitted, from and after the date before mentioned, on the same terms as to duties, imposts, and charges, as vessels of the United States and their cargoes.

See *Oldfield* v. *Marriott*, *supra*, p. 171. This circular of the Secretary has been acted upon and acquiesced in ever since, and no discriminating duties have been levied on any importations in any British vessels, whether in the direct or indirect trade, since January 1, 1850. T. D. 18915 (G. A. 4072), p. 184; Customs Regulations, 1857, Art. 912; 1874, Art. 273; 1884, Art. 257.

In addition to numerous proclamations and orders of like character, specific acts have from time to time been passed exempting the vessels of this or that nation from discriminatory treatment. To set forth at length these statutes and proclama-

tions would unduly extend the argumentative portion of this brief. They are collated in Appendix "B." So all-embracing is the present number and scope of those now in force that collectors of the customs have been directed to collect the discriminating duties only when thereto specifically instructed, and the records of the Treasury Department show not a dollar collected under the discriminating provision of the tariff act of August 5, 1909, 36 Stat. 11, 87, c. 6, section 15, during the fiscal years 1910, 1911, 1912, and 1913; and not a dollar has been collected to date under this section IV, paragraph J, subsection 1, of the present tariff act. See *infra*, p. 109.

There is thus in subsection 1, paragraph J, positive evidence of the intent of Congress not to discriminate solely against British or French shipping in the indirect trade or against other foreign vessels unprotected by treaty. Congress might have determined with reason to abandon entirely the general policy of reciprocity and return to preferential treatment for American ships; but that in one and the same section and paragraph of the tariff act it should have expressly exempted from a discriminatory duty of 10 per cent all of the vessels named, and immediately thereafter should have arranged a preferential discount directed solely against the same ships, is inconceivable. It cannot have intended to blow hot and cold in this fashion.

Subsections 2 and 3 of the same section IV and paragraph J furnish additional evidence that Congress was not singling out the indirect carrying trade in foreign vessels for hostile action.[1] For after a general prohibition of the indirect carrying trade in foreign vessels there is a saving clause for all vessels of those nations which maintain no similar regulation against the United States.

The proviso which is enacted in the present tariff act as a separate subsection 3 was embodied

[1] Subsection 2. That no goods, wares, or merchandise, unless in cases provided for by treaty, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture, or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation. All goods, wares, or merchandise imported contrary to this section, and the vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo shall be liable to be seized, prosecuted, and condemned in like manner, and under the same regulations, restrictions, and provisions as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws.

Subsection 3. That the preceding subsection shall not apply to vessels or goods, wares, or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States.

See to the like effect act of March 1, 1817, 3 Stat. 351, sec. 1; R. S., secs. 2497, 2498; act Aug. 27, 1894, 28 Stat. 550, secs. 15, 16; act July 24, 1897, 30 Stat. 210, secs. 23, 24; act Aug. 5, 1909, 36 Stat. 87, secs. 16, 17.

in the original act of March 1, 1817, as a technical proviso, as follows:

> *Provided, nevertheless,* That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation.

The very object of the proviso, as shown in *Oldfield* v. *Marriott, supra,* p. 168, was further to establish reciprocal immunity from discriminating duties in all foreign carrying trade, direct and indirect.

It is interesting to note in passing that the effect of the exemption clause on subsection 1, paragraph J, and of this subsection 3 on its preceding subsection 2, is in each case to destroy any present operative effect of the main clause. This result is exactly analogous to that produced by the proviso of subsection 7. The majority of the Court of Customs Appeals argued that subsection 7 by their construction would have sufficient operative effect, since the discrimination would operate upon the same quantity of imports as the discrimination in subsection 1. Their premise of fact is not true, for the former affects only dutiable articles, and the latter all imports, whether dutiable or free. Yet if the analogy between the two subsections is to be followed we find that as the discriminating duty of 10 per cent under section 1 is in no case collected, so, also, the discriminating discount in subsection 7 should in no case be allowed.

The discrimination, if directed solely against nontreaty vessels, could have been more clearly and effectively accomplished without sacrifice of revenue by modifying section IV, paragraph J, subsection 1, and adding 5 per cent to the discriminating duty of 10 per cent thereby imposed.

It follows as a corollary from what has just been said that if the sole design of subsection 7 were to give to both domestic and treaty bottoms a discount of 5 per cent, and to discriminate against nontreaty vessels alone, the purpose of Congress could and no doubt would have been attained more directly by merely adding the proposed 5 per cent to the 10 per cent named in subsection 1, with such modification of that subsection as to do away with the exemptions granted by act or proclamation to nontreaty vessels, and to repeal the statutes authorizing them. In such event the discrimination against nontreaty vessels would have been effective both as to goods otherwise dutiable and those upon the free list,—upon all importations, in short; whereas subsection 7 can operate only upon dutiable goods. See Customs Regulations, 1874, Art. 497; 1884, Art. 574; 1892, Art. 904; 1899, Art. 1434; 1908, Art. 1055; *Russell* v. *Williams,* 106 U. S. 623, 627. In this aspect of the matter subsection 7 was wholly unnecessary, and the same result could have been more effectively accomplished not only without loss but with increase of revenue.

After all, it must be remembered that the act we are concerned with is primarily one "to provide revenues for the Government," and section IV,

paragraph J, subsection 7, is only a small portion thereof. As stated in the headnote to *Van Dyke* v. *Cordova Copper Co.*, 234 U. S. 188:

> Although words may be superfluous, if the statute be construed in accordance with the obvious intent of Congress, the courts should not, simply in order to make them effective, give them a meaning that is repugnant to the statute looked at as a whole, and destructive of its purpose.

Can it be imagined that the act under consideration was designed to effect a horizontal cut of 5 per cent in what is certainly by far the larger part of the revenues which the bill was to provide? The schedules of the tariff act were carefully prepared with a view to the amount of revenue necessary to carry on the functions of government. The bill as introduced by Mr. Underwood in the House was prepared after two years of study, thirty days of public hearings, and three months spent in its drafting. Cong. Rec., vol. 50, pt. 1, pp. 433, 434, 460, 566. A volume of statistical information was presented with the report of the Ways and Means Committee. Rept. No. 5, 63d Cong., 1st sess. (to accompany H. R. 3321). The exact needs of the Government for revenue were presented to the Congress. Cong. Rec., *id.*, pt. 1, p. 332; pt. 3, pp. 2373, 2553. It was estimated by Mr. Underwood that the income from tariff duties and income tax would leave "a surplus of revenue over expenditures of something over a million dollars."

If at the time the conference report was adopted it had been suggested that section IV, paragraph J, subsection 7, might reduce by more than $8,000,000 per annum the revenues otherwise to be derived; that this reduction would certainly inure far more to the benefit of foreign vessels than our own; that these foreign vessels so favored would be those of our chief maritime rivals; and that most of the tonnage for which, under the subsection, we could possibly compete on equal terms was already on the free list and therefore unaffected by the discount,—one may safely assume that the proposition would not have received a single vote in either House.

To borrow the language of Mr. Justice Harlan in *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 254:

> * * * No one would expect such a bill to pass an American Congress. If not, we should declare that Congress ever [never] intended to produce such a result; especially, when the act it has passed does not absolutely require it to be so interpreted.

8. Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition.

The doctrine that repugnant clauses in a statute are mutually destructive is certainly neither new nor startling. Not even legislative omnipotence can will contradictions at the same time. A very early illustration of this rule is found in *United*

States v. *Cantril*, 4 Cranch, 167, in which Mr. Chief Justice Marshall held void for repugnancy a statute which declared it a felony "if any person shall utter or publish, as true, any *false*, forged or counterfeited bill or note *issued by order of the president, directors and company of the bank of the United States, and signed by the president and countersigned by the cashier thereof*, with intention to defraud the said corporation," etc. The court made no effort at judicial amendment of the statute as enacted.

As remarked by Mr. Justice McLean in the case of *City of Mobile* v. *Eslava*, 16 Pet. 234, 247:

> A statute so badly drawn as to vest a right to the same property in hostile claimants, would in itself be a nullity.

The case of *In re Hendricks*, 60 Kans. 796, dealt with a statute which created a county court, and provided in one section for the appointment of a judge by the governor within twenty days from the date of the act, and in another section declared that the question of establishing the court should be left to the voters at the next general election, and if the vote be favorable that the governor should then appoint the judge. The court said (p. 806):

> We are aware of the rule which requires courts to endeavor to harmonize conflicting portions of a statute. We have diligently endeavored to observe the rule in this case, but can arrive at no comprehension of the legislative intent in the enactment of this

> measure. It must therefore be held inoperative and void because of the absolute contradiction between its principal provisions. However averse the courts are to such action, they have several times heretofore been compelled to take it. [Citing cases.]

In *Farmers' Bank* v. *Hale,* 59 N. Y. 53, a statute was considered which denounced a forfeiture of interest in twice the amount of excess over the statutory rate of interest paid for usury, and then provided:

> It is hereby declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid, on an equality, in the particulars in this act referred to, with the National Banks organized under the act of Congress * * *.

National banks organized under the acts of Congress were subject to the statute against usury, which provided a forfeiture of the entire principal and interest. This statute, therefore, was declared to will irreconcilabilities, and hence to be inoperative.

A statute must fail when it lays down no standard capable of application. *International Harvester Co.* v. *Kentucky* 234 U. S. 216; *State* v. *West Side Street Ry. Co.,* 146 Mo. 155. The language of Mr. Chief Justice Ruffin in *Drake* v. *Drake,* 4 Devereux (N. C.), 110, 115, is axiomatic:

> Whether a statute be a public or a private one, if the terms in which it is couched be so

> vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible.

As the Supreme Court of the State of Alabama pithily remarks in *Standard Oil Co.* v. *State,* 178 Ala. 400, 403:

> * * * There is no *cy pres* doctrine in the interpretation of statutes.

The situation at bar may be illustrated with the help of *Ropes* v. *Clinch,* 8 Blatchf. 304. The tariff act considered in that case (act of Aug. 5, 1861, 12 Stat. 292, c. 45) imposed duties as follows: "On unmanufactured Russia hemp, forty dollars per ton; on Manila and other hemps of India, twenty-five dollars per ton." The treaty with Russia of 1832, cited in the case of *Taylor* v. *Morton, ante,* had not been denounced. The court held that the statute imposing a higher duty on Russian hemp than on Manila and India hemp annulled, *pro tanto,* the Russian treaty. If, by supposition, in framing this statute there had been added a proviso to the effect that nothing therein contained should be so construed as to abrogate or in any manner impair or affect existing treaties we should have had an open conflict between the express terms of the main clause and the proviso, which would have produced, as in the case at bar, a legislative equipoise.

There remains of course the alternate suggestion that while the act under consideration is inoperative at this time, circumstances may arise under which it will be effective. If in the future these conflicting treaties should be abrogated or repealed, or by diplomatic negotiations be supplemented or modified, the way would be open for goods in American vessels to receive the preferential discount of 5 per cent. The contingency may be remote, but it is none the less possible.

As the Merchant Marine Commission remarked in its report in reference to the negotiation of new treaties without an anti-discrimination clause—

> * * * This, manifestly, would be a difficult, though not an impossible undertaking (Cong. Rec., vol. 50, pt. 5, p. 4499).

In this aspect of the matter subsection 7 falls into the class of statutes upon condition, valid in themselves but inoperative *in praesenti*. Such was the statute discussed in *Dunlap* v. *United States*, 173 U. S. 65, directing a tax on alcohol to be refunded in compliance with certain regulations of the Secretary of the Treasury, which regulations were never made.

Another illustration is to be found in the so-called Canadian reciprocity act of July 26, 1911, 37 Stat. 4, c. 3, providing for a long free list, to become operative whenever the President of the United States should issue a proclamation—a condition which never transpired.

III.

IN NO EVENT MAY THE DISCOUNT BE ALLOWED ON GOODS ENTERED WITHOUT PAYMENT OF DUTY AND WAREHOUSED PRIOR TO OCTOBER 3, 1913, AND NOT WITHDRAWN UNTIL AFTER THAT DATE.

Assuming, for the purposes of argument, that the statute is operative and grants to goods in American vessels, or in American and treaty vessels alike, the discount of 5 per cent, there still remains the question as to the allowance of a discount on goods so imported prior to October 3, 1913.

Section IV, paragraph Q, of the tariff act of 1913, provides:

> That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this act and to no other duty, upon the entry or withdrawal thereof. * * *

The words of section IV, paragraph J, subsection 7, may be repeated for convenience:

> That a discount of five per centum on all duties imposed by this act *shall be allowed* on such goods, wares, and merchandise as *shall be imported* in vessels admitted to registra-

> tion under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation. [Italics ours.]

The Board of General Appraisers regarded the discount as granted only to those ships which imported goods after the tariff act went into effect (R. 35). The majority of the Court of Customs Appeals, on the contrary, considered that paragraph J, subsection 7, must be construed in connection with paragraph Q; that under the decisions goods are not to be regarded as completely imported until the warehouse delivery permits are issued; and consequently that the 5 per cent discount should be allowed on the warehoused goods (R. 70, 71).

1. The language of subsection 7 clearly refers to the future.

As was said by the Board of General Appraisers (R. 35):

> * * * We are of the opinion, however, that the benefit was intended to be extended only to those ships which *imported* goods under the law of 1913. It may be noted that the language of subsection 7 is that the discount shall be allowed on goods which "shall be imported," which implies a future importation.

Paragraph Q of section 4, tariff act of 1913, provides that goods in warehouse "shall be subjected to the duties imposed by this act, and to no other duty, upon the entry or the withdrawal thereof." As we read the statute subsection 7 does not *impose* a duty; it *grants a reduction* for certain considerations. The "duties imposed by this act" are such as are specifically enumerated in the first 386 paragraphs of the act.

2. The purpose to build up American shipping by discriminating duties is in no way furthered by a discount on shipments made prior to the taking effect of the act.

The history of subsection 7, as above set forth, clearly demonstrates that its sole purpose was to aid American shipping interests by offering an inducement to shippers of imported goods of a 5 per cent discount on condition that American bottoms be used. Shipments made prior to the date that the tariff act went into effect could not be influenced by the discount. It seems clear, therefore, that the discount was not intended to be offered on such shipments.

Indeed, instead of construing the act as allowing the discount on goods withdrawn from warehouses for consumption after October 3, 1913, although brought to our shores long before, it would be more in accord with reason to allow the discount only to such importations as were both begun and finished, started from the foreign shore and finished by pay-

ment of duty at our shores, after the date of enactment.[1] The discount is to be allowed on such goods as *shall be imported,* not on goods partially imported previous to October 3, 1913, the importation of which would be subsequently completed.

But it is unnecessary in these cases to contend that subsection 7 grants an allowance only on goods brought by vessels which *left* the foreign shores after October 3, 1913. And Congress apparently drew the line at the date of the enactment, granting the allowance to all future *arrivals.*

8. A tariff revenue law is to be prospectively construed.

In *United States* v. *Heth,* 3 Cranch, 399, there was discussed a statute which provided that—

> there shall * * * be allowed to the collectors * * * two and one-half per centum on all monies which shall be collected and received by them * * * for and on account of the duties arising on goods, wares and merchandise imported into the United States.

[1] Thus, the tariff act of August 30, 1842, 5 Stat. 548, in force on the day of enactment, provided the usual 10 per cent additional duty on importations in foreign vessels not protected by treaty or acts of Congress, and a further additional 10 per cent on importations in foreign vessels from any port east of the Cape of Good Hope (sec. 11). Section 25 then provided: "*And be it further enacted,* That nothing in this act contained shall apply to goods shipped in a vessel bound to any port of the United States, actually having left her last port of lading eastward of the Cape of Good Hope or beyond Cape Horn prior to the first day of September, 1842; * * *."

It was claimed that " goods, wares and merchandise imported " referred to past transactions. The court held that the statute was meant to read " goods, wares, and merchandise which shall be imported." Mr. Justice Paterson said (p. 413):

> * * * Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.

The tariff act of 1894, section 1, construed in *United States* v. *Burr*, 159 U. S. 78, provided—

> That *on and after the first day of August*, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected, and paid," etc.

The act went into effect August 28, 1894. The merchandise in question was entered for consumption and delivered after August 1, 1894, and before August 28. The question was whether duties should be paid under the tariff act of 1890 or under the act of 1894. In favoring the latter construction, the court referred with approval to the quotation from *United States* v. *Heth, supra*, and continued (p. 83):

> * * * and * * * the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix

a future date at which the statutes are to become operative.

* * * * *

(p. 85) These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary.

In arriving at its conclusion that the words in the first section "that on and after the first day of August, eighteen hundred and ninety-four," should not be literally applied, the court was guided by the general presumption against retrospective legislation, especially in connection with tariff laws, by a consideration of the act as a whole and a reference to the legislative history in the House and the Senate. In *United States* v. *American Sugar Company*, 202 U. S. 563, 577, the court followed the case of *United States* v. *Burr, supra*, and quoted with approval the language given above.

4. Exemptions from taxation are to be strictly construed.

It must not be forgotten that subsection 7 is not a statute imposing, but one remitting a tax.

The discount thereby allowed is an exemption from the general rates of duty imposed in section I of the act. In order to qualify under the exemp-

tion a claimant must show a clear title. A doubt resolves the claim against him.

In *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, the court said (p. 146):

> These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being the sole means by which sovereignties can maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.

Undoubtedly paragraph Q is to be construed in connection with subsection 7 and any other relevant sections in determining who is entitled to the five per cent discount. Undoubtedly, also, the determination of the amount of duties to be paid must be made as of the time the duties are paid, and, in case of warehoused goods, when the withdrawal permits are issued. Subsection 7, however, makes it clear that one element in determining the amount

of duties to be paid on particular goods imported is whether the goods have been brought in particular vessels to our shores subsequent to the passage of the act. It is just as much an element in determining the duties to be paid that the importation shall be made in a vessel arriving at our ports subsequent to October 3, 1913, as it is that the vessel be admitted to registration under the laws of the United States or of a treaty nation, or that the goods be subject to duties under the general terms of the act.

IV.

THE CASES OF CUBAN IMPORTATIONS PRESENT NO SEPARATE QUESTION.

In the court below and in the brief supporting the petition for the present writs of certiorari it was contended that in no event could the importations of Cuban tobacco and cigars in American vessels be allowed the discount, on the ground that the peculiar treaty with Cuba of December 11, 1902, 33 Stat. 2136, granting a preferential discount of 20 per cent on Cuban products, especially in view of section IV, paragraph 3, providing particularly for the Cuban treaty, was the full measure of rights and liabilities. Though many considerations support this position (*Faber* v. *United States*, 221 U. S. 649, 658), it is not desired to insist upon it at this time. It is therefore conceded for present purposes that if the 5 per cent

discount be allowed at all it should be allowed on Cuban goods imported in American bottoms in addition to the 20 per cent preferential rate provided in the treaty.

CONCLUSION.

The judgments of the Court of Customs Appeals should be reversed, with directions to order a dismissal of all the cases.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1916.

APPENDIX "A."

Treaty clauses guaranteeing reciprocal immunity from duties discriminating against vessels.

ARGENTINE REPUBLIC, 1853.

Art. VI. 10 Stat. 1005, 1007; 1 Malloy, 20, 22.[1]

The same duties shall be paid, and the same drawbacks and bounties allowed, upon the importation or exportation of any article into or from the territories of the United States, or into or from the territories of the Argentine Confederation, whether such importation or exportation be made in vessels of the United States or in vessels of the Argentine Confederation.

AUSTRIA-HUNGARY, 1829.

Art. III. 8 Stat. 398, 399; 1 Malloy, 29, 30.

* * * And, reciprocally, all kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said states, may also be so imported in Austrian vessels, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

[1] Reference is to compilation of treaties between the United States and other powers published in 1910 under the direction of the Committee on Foreign Relations, United States Senate. S. Doc. No. 357, 61st Cong., 2d sess.

Art. IV. Id.

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Austrian vessels and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said states, and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country.

BELGIUM, 1875.

Art. V. 19 Stat. 628, 630; 1 Malloy, 90, 91.

Objects of any kind soever introduced into the ports of either of the two states under the flag of the other, whatever may be their origin and from what country soever the importation thereof may have been made, shall not pay other or higher entrance duties, nor shall be subjected to other charges or restrictions than they would pay, or be subjected to, were they imported under the national flag.

* * * * *

Art. VII. Id.; id. 92.

All premiums, drawbacks or other favors of like nature, which may be allowed in the states of either of the contracting parties upon goods imported or exported in national vessels, shall be likewise and in the same manner, allowed upon goods imported directly from one of the two countries by its vessels into the other, or exported from one of the two countries by the vessels of the other to any destination whatsoever.

BOLIVIA, 1858.

Art. IV. 12 Stat. 1003, 1006; 1 Malloy, 113, 115.

All kinds of produce, manufactures, or merchandise, of any foreign country which can, from time to time, be lawfully imported into the United States in their own vessels, may be also imported in vessels of the Republic of Bolivia;

and no higher or other duties upon the tonnage of the vessel and her cargo shall be levied and collected, whether the importation be made in the vessels of the one country or of the other; and in like manner all kinds of produce, manufactures, and merchandise of any foreign country that can be, from time to time, lawfully imported into the Republic of Bolivia in its own vessels, whether in her ports upon the Pacific or her ports upon the tributaries of the Amazon or La Plata, may be also imported in vessels of the United States; and no higher or other duties upon the tonnage of the vessel and her cargo shall be levied or collected, whether the importation be made in vessels of the one country or of the other. * * *

CHINA, 1880.

(Continued by Treaty of 1903, Art. XVII, 33 Stat., pt. 2, 2208, 2215.)

Art. III. 22 Stat. 828, 829; 1 Malloy, 239, 240.

* * * * *

The United States hereby promise and agree that no other kind or higher rate of tonnage dues or duties for imports shall be imposed or levied in the ports of the United States upon vessels wholly belonging to the subjects of His Imperial Majesty and coming either directly or by way of any foreign port, from any of the ports of China which are open to foreign trade, to the ports of the United States; or returning therefrom either directly or by way of any foreign port, to any of the open ports of China; or upon the produce, manufactures or merchandise imported in the same from China or from any foreign country, than are imposed or levied on vessels of other nations which make no discrimination against the United States in tonnage dues or duties on imports, exports, or coastwise trade; or than are imposed or levied on vessels and cargoes of citizens of the United States.

NEW GRANADA (COLOMBIA), 1846.

Art. IV. 9 Stat. 881, 882; 1 Malloy, 302, 303.

They likewise agree that whatever kind of produce, manufacture, or merchandise of any foreign country can be,

from time to time, lawfully imported into the United States in their own vessels, may be also imported in vessels of the Republic of New Granada; and that no higher or other duties upon the tonnage of the vessel and her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. * * *

Art. VI. Id. 884; id. 304.

In order to prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the three preceding articles are to their full extent applicable to the vessels of the United States and their cargoes arriving in the ports of New Granada, and reciprocally to the vessels of the said Republic of New Granada and their cargoes arriving in the ports of the United States, whether they proceed from the ports of the country to which they respectively belong, or from the ports of any other foreign country; and in either case, no discriminating duty shall be imposed or collected in the ports of either country on said vessels or their cargoes, whether the same shall be of native or foreign produce or manufacture.

COREA (KOREA), 1882.

Art. V. 23 Stat. 720, 722; 1 Malloy, 334, 336.

Merchants and merchant-vessels of Chosen visiting the United States for purposes of traffic, shall pay duties and tonnage-dues and all fees according to the Customs-Regulations of the United States, but no higher or other rates of duties and tonnage-dues shall be exacted of them, than are levied upon citizens of the United States or upon citizens or subjects of the most favored nation.

Merchants and merchant-vessels of the United States visiting Chosen for purposes of traffic, shall pay duties upon all merchandise imported and exported. The authority to levy duties is of right vested in the Government of Chosen. The tariff of duties upon exports and imports, together with the Customs-Regulations for the prevention of smuggling and other irregularities, will be fixed by the authorities of Chosen and communicated to the proper officials of the United States, to be by the latter notified to their citizens and duly observed.

It is however agreed in the first instance as a general measure, that the tariff upon such imports as are articles of daily use shall not exceed an ad valorem duty of ten per centum; that the tariff upon such imports as are luxuries, as for instance foreign wines, foreign tobacco, clocks and watches, shall not exceed an ad valorem duty of thirty per centum, and that native produce exported shall pay a duty not to exceed five per centum ad valorem. And it is further agreed that the duty upon foreign imports shall be paid once for all at the port of entry, and that no other dues, duties, fees, taxes or charges of any sort shall be levied upon such imports either in the interior of Chosen or at the ports.

United States merchant-vessels entering the ports of Chosen shall pay tonnage dues at the rate of five mace per ton, payable once in three months on each vessel, according to the Chinese calendar.

COSTA RICA, 1851.

Art. VI. 10 Stat. 916, 919; 1 Malloy, 341, 343.

* * * the same duties shall be paid on the importation into the territories of the United States of any article, being the growth, produce, or manufacture of the Republic of Costa Rica, whether such importation shall be made in United States or in Costa Rican vessels.

* * * * *

DENMARK, 1826.

Art. III. 8 Stat. 340; 11 Stat. 719, 720; 1 Malloy, 373, 374.

They, likewise, agree that whatever kind of produce, manufacture or merchandise, of any foreign country, can be, from time to time, lawfully imported into the United States, in vessels belonging wholly to the citizens thereof, may be also imported in vessels wholly belonging to the subjects of Denmark; and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other. * * *

Art. IV. Id. 341; id.

No higher or other duties shall be imposed on the importation into the United States of any article, the produce or manufacture of the dominions of His Majesty the King of Denmark; and no higher or other duties shall be imposed on the importation into the said dominions of any article, the produce or manufacture of the United States, than or shall be payable on the like articles, being the produce or manufacture of any other foreign country. Nor shall any higher or other duties or charges be imposed in either of the two countries on the exportation of any articles to the United States, or to the dominions of His Majesty the King of Denmark, respectively, than such as are or may be payable on the exportation of the like articles to any other foreign country.

FRANCE, 1822.

Art. I. 8 Stat. 278; 1 Malloy, 521.

Articles of the growth, produce or manufacture, of the United States, imported into France in vessels of the United States, shall pay an additional duty, not exceeding twenty francs per ton of merchandise, over and above the duties paid on the like articles, also of the growth, produce or manufacture, of the United States, when imported in French vessels.

Art. II. Id.

Articles of the growth, produce or manufacture, of France, imported into the United States in French vessels, shall pay an additional duty, not exceeding three dollars and seventy-five cents per ton of merchandise, over and above the duties collected upon the like articles, also of the growth, produce or manufacture of France, when imported in vessels of the United States.

Art. VII. Id. 280; id. 522.

The present temporary convention shall be in force for two years from the first day of October next, and even after the expiration of that term, until the conclusion of a definitive treaty, or until one of the parties shall have declared

its intention to renounce it; which declaration shall be made at least six months before hand.

And in case the present arrangement should remain without such declaration of its discontinuance by either party, the extra duties specified in the 1st and 2d articles, shall, from the expiration of the said two years, be, on both sides, diminished by one-fourth of their whole amount, and, afterwards by one-fourth of the said amount from year to year, so long as neither party shall have declared the intention of renouncing it as above stated.

GREAT BRITAIN, 1815.

(Indefinitely extended by commercial Convention of 1827, Art. I, 8 Stat. 361.)

Art. II. 8 Stat. 228; 1 Malloy, 624, 625.

No higher or other duties shall be imposed on the importation into the United States of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of his Britannick majesty in Europe of any articles, the growth, produce, or manufacture, of the United States, than are or shall be payable on the like articles being the growth, produce, or manufacture, of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to his Britannick majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles, the growth, produce, or manufacture, of the United States, or of his Britannick majesty's territories in Europe, to or from the said territories of his Britannick majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.

No higher or other duties or charges shall be imposed in any of the ports of the United States on British vessels, than those payable in the same ports by vessels of the United States; nor in the ports of any of his Britannick majesty's

territories in Europe on the vessels of the United States, than shall be payable in the same ports on British vessels.

The same duties shall be paid on the importation into the United States, of any articles, the growth, produce, or manufacture, of his Britannick majesty's territories in Europe, whether such importation shall be in vessels of the United States or in British vessels, and the same duties shall be paid on the importation into the ports of any of his Brittannick majesty's territories in Europe, of any article, the growth, produce, or manufacture, of the United States, whether such importation shall be in British vessels or in vessels of the United States.

* * * * *

GREECE, 1837.

Art III. 8 Stat. 498, 500; 1 Malloy, 848, 849.

All that may be lawfully imported into the United States of America, in vessels of the said States, may also be thereinto imported in Greek vessels, from whatever place they may come, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if imported in national vessels.

* * * * *

Art. IX. Id. 502; id. 850.

All privileges of transit, and all bounties and drawbacks which may be allowed within the territories of one of the high contracting parties, upon the importation or exportation of any article whatsoever, shall likewise be allowed on the articles of like nature, the products of the soil, or industry of the other contracting party, and on the importations and exportations made in its vessels.

HANSEATIC REPUBLICS, 1827.

Art. I. 8 Stat. 366; 1 Malloy, 901.

The contracting parties agree, that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the

United States in their own vessels, may be also imported in vessels of the said Free Hanseatic Republics of Lubec, Bremen, and Hamburg; and that no higher or other duties upon the tonnage or cargo of the vessel shall be levied or collected, whether the importation be made in vessels of the United States, or of either of the said Hanseatic Republics. * * *

Art. III. Id. 308; id. 902.

No priority or preference shall be given, directly or indirectly, by any or either of the contracting parties, nor by any company, corporation, or agent, acting on their behalf, or under their authority, in the purchase of any article, the growth, produce, or manufacture of their States, respectively, imported into the other, on account of, or in reference to, the character of the vessel, whether it be of the one party or of the other, in which such article was imported; it being the true intent and meaning of the contracting parties that no distinction or difference whatever shall be made in this respect.

HONDURAS, 1864.

Art. VI. 13 Stat. 699, 702; 1 Malloy, 952, 954.

The same duties shall be paid on the importation into the territories of the Republic of Honduras of any article being of the growth, produce, or manufacture of the territories of the United States, whether such importation shall be made in vessels of Honduras or of the United States; and the same duties shall be paid on the importation into the territories of the United States of any article being the growth, produce, or manufacture of the Republic of Honduras, whether such importation shall be made in the United States or in Honduras vessels.

* * * * *

ITALY, 1871.

Art. I. 17 Stat. 845; 1 Malloy, 969, 970.

There shall be between the territories of the high contracting parties a reciprocal liberty of commerce and navigation.

Italian citizens in the United States, and citizens of the United States in Italy, shall mutually have liberty to enter with their ships and cargoes all the ports of the United States and of Italy, respectively, which may be open to foreign commerce. They shall also have liberty to sojourn and reside in all parts whatever of said territories. They shall enjoy, respectively, within the states and possessions of each party, the same rights, privileges, favors, immunities, and exemptions for their commerce and navigation as the natives of the country wherein they reside, without paying other or higher duties or charges than are paid by the natives, on condition of their submitting to the laws and ordinances there prevailing.

* * * * *

Art. V. Id. 847; id. 971.

The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; * * *.

JAPAN, 1911.

Art. VIII. 37 Stat., pt. 2, 1504, 1506; Charles, 79, 80.

All articles which are or may be legally imported into the ports of either High Contracting Party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other Contracting Party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

* * * * *

LIBERIA, 1862.

Art. III. 12 Stat. 1245; 1 Malloy, 1050, 1051.

* * * no tonnage, import, or other duties or charges shall be levied in the United States of America and their territories on the vessels of the Republic of Liberia, or on goods imported or exported in those vessels, beyond what are or may be levied on national vessels, or on the like goods imported or exported in national vessels.

MECKLENBURG-SCHWERIN, 1847.

Art. I. 9 Stat. 910, 911; 1 Malloy, 1074, 1075.

The high contracting parties agree that whatever kind of produce, manufacture, or merchandise of any foreign country can be, from time to time, lawfully imported into the United States in their own vessels, may also be imported in the vessels of the Grand Duchy of Mecklenburg-Schwerin, and no higher or other duties upon the tonnage or cargo of the vessel shall be levied or collected, whether the importation be made in a vessel of the United States, or in a vessel of Mecklenburg-Schwerin.

* * * * *

NETHERLANDS, 1852.

Art. I. 10 Stat. 982; 2 Malloy, 1248.

Goods and merchandise, whatever their origin may be, imported into or exported from the ports of the United States, from and to any other country, in vessels of the Netherlands, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels. Reciprocally, goods and merchandise, whatever their origin may be, imported into or exported from the ports of the Netherlands, from and to any other country, in vessels of the United States, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported in national vessels.

The bounties, drawbacks, and other privileges of this nature, which may be granted in the States of either of the contracting parties, on goods imported or exported in na-

tional vessels, shall also and in like manner be granted on goods imported or exported in vessels of the other country.

Art. XI. Id. 983; id. 1249.

The above reciprocal equality in relation to the flags of the two countries is understood to extend also to the ports of the colonies and dominions of the Netherlands beyond the seas, in which goods and merchandise, whatever their origin may be, imported or exported from and to any other country in vessels of the United States, shall pay no higher or other duties than shall be levied on the like goods and merchandise imported or exported from and to the same places in vessels of the Netherlands. The bounties, drawbacks, or other privileges of similar denomination which may be there granted on goods and merchandise imported or exported in vessels of the Netherlands shall also, and in like manner, be granted on goods and merchandise imported or exported in vessels of the United States.

NORWAY, 1827.

Art. III. 8 Stat. 346, 348; 2 Malloy, 1748, 1750.

All that may be lawfully imported into the United States of America, in vessels of the said States, may also be thereinto imported in Swedish and Norwegian vessels, and in those of the island of St. Bartholomew, from whatever place they may come, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name, or to the profit, of the Government, the local authorities, or of any private establishments whatsoever, than if imported in national vessels.

* * * * *

Art. V. Id.

The stipulations contained in the three preceding articles, are to their full extent, applicable to the vessels of the United States of America, proceeding, either laden, or not laden, to the colony of St. Bartholomew, in the West Indies, whether from the ports of the kingdoms of Sweden and Norway, or from any other place whatsoever; or proceeding from the

said colony, either laden or not laden, whether bound for Sweden or Norway, or for any other place whatsoever.

Art. X. Id. 350; id. 1751.

All privileges of transit, and all bounties and drawbacks which may be allowed within the territories of one of the high contracting parties, upon the importation or exportation of any article whatsoever, shall, likewise, be allowed on the articles of like nature, the products of the soil or industry of the other contracting party, and on the importations and exportations made in its vessels.

PARAGUAY, 1859.

Art. VI. 12 Stat. 1091, 1094; 2 Malloy, 1384, 1386.

The same duties shall be paid upon the importation and exportation of any article which is or may be legally importable or exportable into the dominions of the United State of America and into those of Paraguay, whether such importation or exportation be made in vessels of the United States of America or in Paraguayan vessels.

Art. VIII. Id.

Citizens of the United States of America shall pay, in territories of the Republic of Paraguay, the same import and export duties which are established or may be established hereafter for Paraguayan citizens. In the same manner the latter shall pay, in the United States of America, the duties which are established or may hereafter be established for citizens of the United States of America.

PRUSSIA, 1828.

Art. III. 8 Stat. 378; 2 Malloy, 1496, 1497.

* * * all kind of merchandise and articles of commerce, either the produce of the soil or of the industry of the kingdom of Prussia, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may, also, be so imported in Prussian vessels, without paying other or higher duties or charges, of whatever kind or denomination, levied in

the name, or to the profit of the government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America.

Art. IV. Id. 380; id. 1497.

To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles, are, to their full extent, applicable to Prussian vessels, and their cargoes, arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes, arriving in the ports of the Kingdom of Prussia, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country.

Art. VIII. Id. 382; id. 1498.

No priority or preference shall be given, directly or indirectly, by either of the contracting parties, nor by any company, corporation, or agent, acting on their behalf, or under their authority, in the purchase of any article of commerce, lawfully imported, on account of, or in reference to, the character of the vessel, whether it be of the one party, or of the other, in which such article was imported: it being the true intent and meaning of the contracting parties, that no distinction or difference, whatever shall be made in this respect.

SPAIN, 1902.

Art. VIII. 33 Stat., pt. 2, 2105, 2109; 2 Malloy, 1701, 1703.

All the articles which are or may be legally imported from foreign countries into ports of the United States, in United States' vessels, may likewise be imported into those ports in Spanish vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels; * * *.

SWEDEN, 1827.

Arts. III and V. 8 Stat. 346; 2 Malloy, 1746, 1750.

Same as Norway, *supra*.

APPENDIX "B."

Statutes, proclamations, and orders providing for reciprocal immunity from discriminating duties.

Specific Statutes.

Belgium, 5 Stat. 152, Mar. 2, 1837, c. 19.
British colonial ports, 3 Stat. 740, Mar. 1, 1823, c. 22.
British West Indies and other islands, 4 Stat. 419, May 29, 1830, c. 207.
Colombia, 4 Stat. 154, Apr. 20, 1826, c. 26.
Colombia, 4 Stat. 515, May 19, 1832, c. 79.
France, from Martinique and Guadaloupe, 4 Stat. 269, May 9, 1828, c. 49.
France, from French Guiana, 5 Stat. 489, June 1, 1842, c. 32.
France, from Miquelon and St. Pierre, 5 Stat. 748, Mar. 3, 1845, c. 66.
Hanseatic Republics, 4 Stat. 2, Jan. 7, 1824, c. 4.
Hamburg and Bremen, 3 Stat. 510, Mar. 3, 1819, c. 75.
Netherlands, 3 Stat. 464, Apr. 20, 1818, c. 110.
Netherlands, 4 Stat. 2, Jan. 7, 1824, c. 4.
Norway, 4 Stat. 2, Jan. 7, 1824, c. 4.
Oldenburg and Prussia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Portugal, 5 Stat. 125, July 4, 1836, c. 359.
Prussia, 3 Stat. 510, Mar. 3, 1819, c. 75.
Prussia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Prussia, 4 Stat. 308, May 24, 1828, c. 111; R. S. secs. 4229, 4230.
Russia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Sardinia, 4 Stat. 2, Jan. 7, 1824, c. 4.
Spain, 4 Stat. 578, July 13, 1832, c. 207.
Spain, 9 Stat. 236, May 31, 1848, c. 55.
Spain, 15 Stat. 282, Mar. 1, 1869, c. 54.
Sweden and Norway, 4 Stat. 206, Feb. 22, 1827, c. 21.

Certain of these, of course, are superseded by the later treaties.

General Acts.

The following are effective as to any nondiscriminating nation upon Executive proclamation:

Act of March 3, 1815, 3 Stat. 224, c. 77; direct trade.
Act of January 7, 1824, 4 Stat. 2, c. 4; direct trade.
Act of May 24, 1828, 4 Stat. 308, c. 111; direct and indirect trade.
Revised Statutes, section 4228.
Act of July 24, 1897, 30 Stat. 214, c. 13, amending section 4228, R. S., by extension to countries imposing partial discrimination.

The Dingley Tariff Act of July 24, 1897, 30 Stat. 151, 209, c. 11, exempted treaty vessels from the discriminating duty of 10 per cent but omitted from the exempting clause vessels theretofore entitled to immunity from discrimination under proclamations of the President (sec. 22). This, however, did not have the effect of repealing section 4228 of the Revised Statutes, under which the proclamations providing reciprocal immunity from discriminating duties were promulgated. 21 Opin. A. G., p. 597. The class of nontreaty vessels protected from discriminating duties under acts of Congress was again expressly exempted from the discriminating duty, together with treaty vessels, under the subsequent tariff acts of 1909 and 1913. Act of August 5, 1909, 36 Stat. 11, 87, c. 6, sec. 15; act of October 3, 1913, 38 Stat. 114, 192, 195, c. 16, sec. IV, par. J, subsec. 1.

Proclamations and Orders.

Austria, 4 Stat. 814, June 3, 1829.
Austria, 4 Stat. 816, May 11, 1829.
Brazil, 9 Stat. 1001, Nov. 4, 1847.
Bremen, 3 Stat. App. I, July 24, 1818.
British Islands and possessions, 4 Stat. 817, Oct. 5, 1830.
Chile, 9 Stat. 1004, Nov. 1, 1850.
China, 21 Stat. 800, Nov. 23, 1880.
Cuba, 32 Stat. 2013, July 3, 1902.
France, 16 Stat. 1127, June 12, 1869.
France, 16 Stat. 1130, Nov. 20, 1869.
France, 17 Stat. 957, Oct. 30, 1872.

France, 18 Stat. 844, Sept. 22, 1873.
France from Miquelon and St. Pierre, 9 Stat. 1001, Apr. 20, 1847.
Greece, 11 Stat. 783, June 14, 1837.
Hanover, 4 Stat. 815, July 1, 1828.
Hamburg, 3 Stat. App. I, Aug. 1, 1818.
Hawaiian Islands, 14 Stat. 819, Jan. 29, 1867.
Japan, 17 Stat. 956, Sept. 4, 1872.
Lubeck, 3 Stat. App. I, May 4, 1820.
Mecklenberg-Schwerin, 11 Stat. 781, Apr. 28, 1835.
Mexico, T. D. 20690, Feb. 11, 1899.
Nicaragua, 13 Stat. 739, Dec. 16, 1863.
Norway, 3 Stat. App. I, Aug. 20, 1821.
Oldenburg, 3 Stat. App. I, Nov. 22, 1821.
Oldenburg, 4 Stat. 814, Sept. 18, 1830.
Panama, 34 Stat. 3038, May 15, 1905.
Pope, 11 Stat. 768, June 7, 1827.
Pope, 11 Stat. 795, Feb. 25, 1858.
Portugal, 11 Stat. 784, Oct. 11, 1837.
Portugal, 16 Stat. 1137, Feb. 25, 1871.
Spain, except Cuba and Porto Rico, 17 Stat. 954, Dec. 19, 1871.
Spain, from Cuba and Porto Rico, 23 Stat. 835, Feb. 14, 1884.
Spain, from Cuba and Porto Rico, 24 Stat. 1028, Oct. 13, 1886.
Spain, 24 Stat. 1030, Oct. 27, 1886.
Spain, 25 Stat. 1482, Sept. 21, 1887.
Tuscany, 11 Stat. 782, Sept. 1, 1836.
Geat Britain, T. D. 18383, Sept. 25, 1897; Cus. Reg. 1857, art. 912; 1874, art. 273; 1884, art. 257.
Costa Rica, T. D. 13133, Aug. 23, 1892.

Customs Regulations of 1884 enumerate as exempt from discriminating duties vessels of the following nations (pp. 119 to 124):

Argentine Confederation,
Austria,
Belgium,
Bolivia,
Borneo,
Brazil,
Chili,
China,
Costa Rica (direct trade),
Denmark,
Dominican Republic,
Ecuador,
France,
German Empire,

Great Britain and her possessions.
Greece,
Guatemala,
Hayti,
Hanseatic Towns: Hamburg, Lubec, Bremen,
Hawaiian Islands,
Honduras,
Italy,
Japan,
Liberia,
Madagascar,
Mecklenburg-Schwerin,
Mexico,
Netherlands,
New Grenada, United States of Colombia,
Nicaragua,
Norway,
Oldenburg,
Orange Free State (direct trade),
Ottoman Empire,
Paraguay,
Persia (direct trade),
Peru,
Portugal,
Prussia,
Russia,
Sandwich Islands,
Salvador,
Serbia,
Spain, except Cuban and Porto Rican merchandise,
Sweden and Norway, including island of St. Bartholomew.

Collectors of customs were instructed on January 31, 1898, that "should any foreign merchandise become legally liable to the discriminating duty provided for by section 22, due notice will be given by this Department." T. D. 18900. See Customs Regulations of 1908, art. 1055, p. 434. No notice has been given under this regulation.

Customs Regulations of 1915, article 631, page 312, provide:

> The discriminating duties provided by subsection 1 of paragraph J of section 4 of the tariff act of October 3, 1913, as amended by the act of March 4, 1915, will be imposed only in pursuance of specific instructions issued and published from time to time by the Secretary of the Treasury.

No instructions thereunder have been issued to this date directing the imposition of the discriminating duty.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915.

THE FIVE PER CENT. DISCOUNT CASES.	Nos. 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509.

BRIEF IN BEHALF OF IMPORTERS INTERESTED IN THE ABOVE MENTIONED ISSUE.

This brief is filed, with the Court's permission by Hatch & Clute, attorneys, in behalf of a number of clients interested in the five per cent. discount question. As a number of appeals will be briefed, we do not deem it necessary to elaborate this brief as fully as might be required otherwise. Accordingly, we desire to bring to the Court's attention, briefly only, such points as appear to us pertinent to the issue.

The whole question to whatever extent it may be elaborated begins and comes back again to the following language:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchan-

dise as shall be imported in vessels admitted to registration under the laws of the United States: Provided, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The question presents three possibilities:

(1) Allow no discount;

(2) Allow it on goods imported in American vessels;

(3) Allow it on goods imported in American vessels, and in foreign vessels entitled by treaty.

The officers charged with the enforcement of the law adopted the first course. The Board of United States General Appraisers adopted the second. The Customs Court adopted the third.

To understand the matter better it may be well to recall briefly the orign of the subsection in question. In the bill that came from the House to the Senate there was the simple provision for a five per cent. discount on American vessels without any proviso.

But in the Senate inquiry was made as to the effect of such an allowance upon our treaties with other nations. It was quite natural that the Senate should raise this question, in view of the fact that the treaty-making power of our Government is vested in the President by and with the advice and consent of the Senate. The Senate feared that a conflict or dispute would arise with foreign nations by reason of existing treaties. For example, at page 4237 of the Congressional Record, 63d Congress, First Session, there was a communication from the President with enclosure, which in-

dicated fear that the enactment of the clause would lead to international complications and diplomatic negotiations, on the ground that it would be a breach of our treaties to enact such a clause. It is also significant, as subsequent developments show, that Mr. Moore pointed out to the Senate, at this stage of the proceedings, that there would probably be no objection to the House proposal if the discount were extended to foreign vessels entitled thereto by treaty.

Again, at pages 4500 and 4501 of the Congressional Record, will be found further general fears expressed in the Senate of the result. At page 5345 of the record, in a letter from Mr. Polk to Senator Simmons, it is stated there would seem to be no question but that the result would be to violate the treaties. The Senate was also advised what nations would be affected by the proposed enactment, and what nations would not be so affected; also in the case of British ships the distinction between those bringing goods from Great Britain's Territories in Europe and from other parts of the world was pointed out. The reasons are obvious, therefore, which led the Senate Committee to propose to strike out of the Act, as it came from the House, Section J, Subsection 7 (see Congressional Record, p. 4494). This was done by the Senate, and the bill went to conference with that section struck out, but as a result of the conference, as shown at page 5311 of the record (Amendment 657), the subsection was restored, but with the proviso added. At page 5323 of the record, Senator Simmons, in offering a statement of the principal changes relating to the administrative sections, said:

"The provisions allowing a discount of 5 per

cent. on duties on goods imported in vessels of United States register are modified so as not to apply to nations having treaties providing for equal treatment of imports in vessels of both countries."

It seems plain, therefore, from a history of the enactment, that it was the earnest desire of the House to give a discount to importers of merchandise in American vessels, but that the Senate apprehended some treaties might be dishonored. Accordingly the Senate proposed to strike the subsection out, but in conference a compromise was reached, so that while on the one hand, importers by American vessels should have the discount as the House wanted, on the other our treaties should be observed as the Senate desired.

The Senate's apprehension would appear to have been well founded if the law had been enacted as proposed by the House, and the Executive Department had thereafter allowed the discount on American vessels and ignored treaty rights.

It would be natural, therefore, that the Senate as a matter of precaution to protect its views, should lay an injunction on the Executive Department that, in carrying out the law giving a discount to importers in American vessels, it should be done in such a manner as would not impair or affect the provisions of any treaty.

Since this whole question in the last analysis comes down to the proviso, and what Congress meant and intended by tacking it on to the enacting clause, a critical examination of the proviso would seem to be necessary to a correct conclusion. Naturally, the office or function of the word "provided" as used in the subsection, becomes of

first importance. The word has three functions as used in Statutory Law as shown by the decisions:

(1) To carve an exception out of a preceding general provision;

Ex P: Lusk, 82 Ala., 519, 522.

(2) To state a condition upon which the happening of the preceding matter depends;

Forscht *v.* Green, 53 Pa., 138, 140.

(3) As an explanation to guard against a misinterpretation of the preceding matter.

Bastin *v.* Bidwell, 18 Ch. Div., 238, 244.
Minis *v.* U. S., 15 Pet., 423.

Which office of these three the word performs must be determined from the sense and meaning of the subject matter.

Boston Safe Deposit & Trust Co. *v.* Thomas, 59 Kan., 470, 472 and 473.
Carroll *v.* State, 58 Ala., 396, 401.

Our contention is that in the present case it was used *as an explanation to guard against a misinterpretation of the preceding matter.* Its origin demonstrates this and shows that the Legislative Department of the Government to avoid misconstruction being put upon its intent in enacting the discount provision, made it a part of the law, that the Executive Department in carrying it into practical effect, and the Judicial Department in construing it, should not so carry it into effect or so construe it as to impair any treaty. In order to give effect to the enacting clause and at the same time obey the injunction not to impair any treaty, leaves only one course of three suggested herein

open, namely, to allow the discount to importers in American vessels and in vessels of nations entitled thereto by treaty. This would be in harmony with the suggestions of Professor Moore, and the object of the proviso as stated by Senator Simmons, not that these suggestions and statements control in arriving at the intent of Congress, but that they are cogent contemporary events aiding in a right solution of the question.

We come then to the position taken by the Attorney General, as disclosed in the Board's decision and followed by the Treasury Department, namely, that the 5 per cent. discount cannot be given to American vessels *only*, without impairing *the stipulations of existing treaties between the United States and other powers.* This is a most important statement, because the political department of our Government, charged with executing or withholding the benefits of treaties, and which power the decisions show, is not delegated to the judiciary, *admits that the treaties in question are in force* and entitled to recognition by the United States. It was a reiteration of the same statement made by the Executive Department to the Senate. If the Executive Department charged with that duty admits that they are in force, and that their benefits have not been withdrawn, then the position that the Courts cannot enforce a treaty on the ground that it is a political question for the Executive Department to decide whether the benefit shall be given or withheld, can have no application in this case where the record and the facts show that the Executive Department admits that the treaties are in force and have not been withdrawn, and should be observed, and that the dis-

count cannot be given to American vessels *only*, without breaking said treaties.

We respectfully submit that under the Constitution such treaties are the supreme law of the land and will be enforced by this Court, and this particularly so in the present case inasmuch as the proviso *executed* the treaties and made the stipulations therein contained a rule of law both for the Executive and Judicial Departments of the Government.

The proviso was a statement in negative form of a declaration on the part of Congress that our treaties should be observed. In other words, the Legislative Department declared to the Executive and the Judicial that in carrying into effect the law that a discount of five per cent. should be allowed on goods in American vessels, it should be so done as not to impair any treaty, but on the other hand that full force and effect should be given to the stipulations contained in said treaty.

It has been said that these treaties were contracts addressing themselves to the legislative power. But conceding this point we assert that the legislative power took notice of them, arising out of the inquiries made in and the information furnished to the Senate, and by way of precaution (*ex industria*) enacted the proviso to safeguard those contracts by declaring that they should be respected. If the stipulations in the treaties imported a contract that the United States would treat the vessels of the parties equally, then Congress carried those stipulations out and confirmed them by declaring that in allowing the discount to American vessels those stipulations should not be impaired.

We submit there is only one way that the law

as enacted by Congress to allow a discount on American vessels, but not to impair any treaty, can be observed, and that is to give the discount to American vessels, and to foreign nations so entitled by treaty.

We do not understand that the Courts inquire into the expediency of laws, as that is a legislative question and not a judicial one, but inasmuch as the Solicitor General argues, on ground of expediency, that giving the discount to foreign vessels practically nullifies the benefit to American vessels, we wish to point out for example, that the treaty with Great Britain only gives equal treatment to vessels of that nation when importing goods *which are the product of his Brittanic Majesty's territories in Europe* (Treaty of 1815, Article the second). It is a well known fact that British vessels carry a large percentage of the goods imported into this country from other parts of the world than from Great Britain and Ireland proper, also that much of the merchandise brought from England is not the *product* of that country, but gathered from the four quarters of the earth by British traders and transshipped from the London docks to this country. This in itself would open a wide field for preference to American vessels, at the same time respecting the rights of Great Britain so far as the importation of goods from Great Britain and Ireland went, by putting the vessels of the two nations on terms of equality in that respect.

The whole question of policy and expediency was gone into and debated by Congress, as well as the nations to be benefited by treaty and to what extent, and those not to be benefited, including the limitations of the British treaty just referred to.

The Solicitor General, in his brief, cites figures arguendo, that not much good would come from enforcing the law. It we understand his figures rightly, there is an error in his method which seriously vitiates the argument that follows.

At page 62 of his brief and again at page 64 he computes the total duties at the average ad valorem rate, on the total imports in United States and treaty bottoms, but in computing it upon competitive imports he first deducts the imports, something over 90 per cent. of which are free, and applies the average ad valorem rate of $14.88 only to the balance, whereas the average ad valorem rate was ascertained on the basis of the total free and dutiable goods imported. Therefore, we submit it is erroneous to include the free goods in the first case and omit them in the second.

If this question of expediency is an arguable question before this Court, then it may be said that the ship which secures the freight on the dutiable goods would quite likely secure it on the free. Free and dutiable goods are in practice mingled in one shipment on one invoice to one importer. But all of this goes to show the futility of going into these questions which were properly addressed to the legislative branch of our Government. The thing to do would be to stop speculating about what will happen and give the law a practical trial to find out whether the collective wisdom of Congress was justified. If not, then let Congress remedy the law.

The history of the times shows Congress was seeking a way to help American shipping. Enforcing this law might not give the maximum of aid, but there is certainly a sufficient non-competi-

tive field, even on the figures in the Solicitor General's brief, to create an entering wedge. Perhaps all American shipping needs is a slight help to give it a marked impetus. We do not believe that what would amount to a subsidy of eight or ten million dollars annually, even on the Solicitor General's figures, would be disproportionate to subsidies paid by other Governments to encourage shipping.

At page 67 of the Solicitor General's brief, still arguing about the expediency of the law, it is stated in substance that foreign exporters will naturally favor their own country's ships. Two considerations are overlooked in making that statement, first, that the American buyer has the right to dictate shipping directions and second that the discount or subsidy goes *not to the ship*, but to the importer. The law, therefore, is adroitly drawn to give the American importer the benefit, and thereby invoke his power to dictate to the foreign seller that his goods shall be shipped in American bottoms.

It is familiar law, however, that questions of policy or expediency are not for the Courts or executive department, but for the legislative.

> M'Culloch *v.* Maryland, 4 Wheat., 316, 423.
> Providence Bank *v.* Billings, 4 Pet., 514, 563-4.
> U. S. *v.* Union P. R. Co., 91 U. S., 72.

In the case last cited this Court said, at page 61:

> "The rights of the parties rest upon a statute of the United States. Its words as well as its reason, spirit and intention, leave, in

> our opinion, no room for doubt as to its true meaning. We cannot sit in judgment upon its wisdom or policy. When we have interpreted its provisions, if Congress has power to enact it, our duty in connection with it is ended."

This whole question apparently has arisen from a dislike in or by the Executive Department with the policy of Congress in this matter, and a disagreement with Congress as to the expediency of the law. Evidently the Executive Department could not possibly bring itself to make an allowance to foreign ships entitled thereto by treaty. On the other hand, it recognized *and admitted* that it could not allow the discount to American vessels without breaking those treaties, therefore it was driven, out of necessity, to nullify the law.

It has been suggested in this case that a reduction of duties under these treaties would be unconstitutional, as an interference by the treaty-making power with the prerogative of the House of Representatives to initiate all bills affecting the revenues. That would raise a question which has been debated since the earliest times of our Government without either the House or the Senate yielding to the other on that point, namely, whether the President, by and with the advice and consent of the Senate can conclude a treaty which affects the revenues of the Government without the consent of the House.

> See Butler, Treaty-making Power of the United States, Vol. 1, page 439, Sec. 307.
>
> House of Representatives, Report No. 4177, 49th Congress, 2nd Session, March 3, 1887.

But such a question does not arise for the ob-

vious reason that if Section J, Subsection 7, does affect the revenues by giving force to treaties theretofore made, it is in a bill originating in the House as a revenue bill, and is an *Act of Congress*, as distinguished from an act or resolve of the Senate. In other words, if we accept the contention of the House of Representatives that a treaty affecting the revenue cannot be made by the President and Senate without the consent of the House, evidenced by an Act of Congress, then in this case its consent has been given in that it joined with the Senate in declaring that these treaties should not be impaired, and the disputed question therefore does not arise.

If these minor points may be thus disposed of, we come back again to the fundamental question with respect to the proviso. In Bastin *v.* Bidwell, 18 Ch. Div., 238, at 234, the Court said, speaking of a case cited:

> "It was said there that the word 'proviso' always implies a condition. That must be taken with some qualification, because upon reference to Bacon's Abridgment, 'Covenant A' (2), it will be found that whether 'proviso' implies a condition or not must of course depend on the context; sometimes it is a mere explanation; sometimes it is an exception."

And in Carroll *v.* State, 58 Ala., 396, at 401:

> "Another purpose for which it is often employed, is to exclude some possible misinterpretation of the general words of the enacting clause, as extending to cases not intended to be brought within its purview (Minis *v.* U. S., 15 Pet., 423). It does not necessarily follow because the term provided is used that which may succeed it is a proviso, though that is the form in which an exception is generally made to or a restraint or qualifica-

tion imposed on the enacting clause. It is the matter of the succeeding words and not the form which determines whether it is or is not a technical proviso."

See, also,

Georgia Banking Co. *v.* Smith, 128 U. S., 174, 181.

It is obvious that the proviso here in question is not an exception, which would be illustrated by supposing that Congress had passed the enacting clause, but provided that it should not apply to sailing vessels; nor is the proviso a condition, which might be illustrated by supposing that Congress had passed the enacting clause, but provided that the crews of such vessels should all be American citizens. If, then, an attentive examination of the proviso demonstrates that it is neither an exception nor a condition, there is left only the conclusion that it is an explanation to guard against a misinterpretation.

This conclusion is strengthened when we consider that the law as proposed by the House, made no mention of foreign treaties; that the Senate raised the question that the law as proposed would violate treaties, and therefore struck it out; and, finally, that in conference a compromise was reached by restoring the enacting clause, but adding the proviso protecting treaty rights. These considerations make it plain that this proviso was made a part of the law out of an abundance of caution and to guard against any misinterpretation of the intent of Congress with respect to national treaty obligations.

It is familiar law that Acts of Congress and treaties are equally the supreme law of the land,

and that if Congress passes a law subsequent in time to a treaty, which is in direct conflict with such a treaty, the law of Congress governs and the treaty is nullified (38 Cyc., 975). When this is borne in mind it becomes apparent that the proviso was attached to the enacting clause to make it plain that Congress did not mean in passing the law to abrogate or impair any treaties.

If, then, Congress declared that a discount of 5 per cent. should be given on goods imported in American vessels, but, in giving it, declared that no treaty should be abrogated, impaired or affected thereby, we respectfully submit that the way to comply with the law is to give the discount to American vessels and to the vessels of nations entitled by treaty to equal treatment. This would be in accord with the result reached by the Customs Court.

Dated, New York, February 15, 1916.

Respectfully submitted,

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IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA,
Petitioner.

vs.

THE M. H. PULASKI CO., *et al.*

Brief of William L. Wemple, Formerly Assistant Attorney General in Charge of Customs and Petition for Leave to File the Same.

WILLIAM L. WEMPLE,
30 Broad Street,
New York City.

IN THE

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UNITED STATES OF AMERICA,
Petitioner.

vs.

THE M. H. PULASKI CO., *et al.*

Brief of William L. Wemple, Formerly Assistant Atorney General in Charge of Customs; and Petition for Leave to File the Same.

The undersigned, WILLIAM L. WEMPLE, respectfully prays leave of the Court to file the following brief as *Amicus Curiae.*

WILLIAM L. WEMPLE.

Brief.

POINT I.

Every statute is entitled to enforcement according to the fair meaning of the language in which it is phrased.

These appeals present to the Court this question: Which if any of the cargoes involved are entitled to a discount of 5 per cent. upon the amount of duties prescribed by the various schedules of the Act of October 3, 1913, entitled *"An Act to reduce tariff duties and to provide revenue for the Government and for other purposes."*

Let it be noted here that so far as the tariff is concerned, that enactment was *to reduce duties;* the revenues for the Government were to be provided by the income tax sections. This may prove to be a consideration of importance in the discussion of the case, for this reason: It is persistently urged that "Congress could not have intended" to pass a law which in ultimate operation might have the effect of rebating 5 per cent. of the duties upon a great part of all importations.

This complaint is fairly well answered and disposed of by the title of the Act, above quoted. The purpose of the Act was to reduce duties. If it turns out that by reason of J Subs. 7 the duties levied by the Act average 23.75 per cent. of the value of dutiable importations instead of 25 per cent. as might be the case if that subsection had been omitted, that does not constitute any reason whatever for construing the subsection out of existence.

Being concerned with the litigation only from the standpoint of ship owners and shipping and without any but the most indirect interest in the result of these appeals, I shall attempt to state shortly my premises and conclusions, with some citation of authorities.

THE STATUTE:

> "J. Subsection 7. That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

There is no ambiguous language in this paragraph. No difficulty is encountered in getting all parties to an agreement as to what a discount is; or a treaty; "impair" is a word which is perfectly understood, and "affect" has been judicially defined, if there were any trouble about its meaning (see Point III).

In the presence of clear language, it is not material or relevant to consider what was said about the bill by the floor leader either in the presence of the members, or in committee or privately. All talk of the "intent of Congress" is merely confusing; for first and last the "intent of Congress" must be found in the language Congress has used, and nowhere else. Indeed one might wish that the phrase "intent of Congress" would speedily disappear from juridical discussion; Congress has no "intent," and in the nature of things can have none. The expression is one of those meaningless figures of speech which come into use as a substitute for laborious analysis and accurate writing.

Everybody knows that the evil which brought about the enactment of this statute was the sad plight into which American-owned shipping had fallen. The law aims to give shippers an incentive in the shape of lower duties for shipping in American ships and the fact that shippers are searching for and demanding American bottoms in which to load their goods, will cause American bottoms to be supplied. Established economic principles would justify that expectation.

Still this quotation from the proceedings of Congress by appellant and appellee, goes on; but with what profit or purpose it is impossible to comprehend. It cannot be proved by such evidence that the act was not passed; or that something was passed different from what is before us (*Field* v. *Clark*, 143 U. S. 649).

POINT II.

Hence the great problem in the case is not whether this section is a law entitled to enforcement at the hands of the executive, but what relief it grants to suitors, and in what forum that relief is obtainable.

It is clear that the courts of the United States can enforce the right of goods imported in American vessels to 5 per cent. discount; the municipal law of the United States gives it to them, and no law has yet taken it away. The Act does not grant 5 per cent. to goods brought in vessels of the United States, *provided* the executive shall be of opinion the revenues will not suffer; or on condition the executive shall find the allowance of it will in fact increase and benefit American shipping.

Because, however, the executive departments held the opinion that in view of certain old treaties between this country and other nations, this law would entitle almost all importations to the discount, and leave only a small percentage to pay duties without discount, it has been ruled by them that the law is no law; that it is self-destructive, and that no cargoes whatever can be brought within the terms of the act.

Suppose it were proved by test that, treaties or no treaties, 5 per cent. discount on duties was too small an advantage to overcome the disadvantages which have driven American ship owners to operate under foreign flags; would the executive then as now hold that because it did not increase American tonnage, the importers could no longer have the discount?

It would be at least as reasonable, I submit, to take such a position after knowing something about the operation of the law or perhaps its failure to operate, as to adopt it in advance of information, and upon departmental opinion only.

The Government has involved itself in error in this case, because it started with the judgment and then looked back for grounds upon which to support it. If the easy processes of logic had been followed step by step, the result might have been unwelcome, but it would have been no less right than inevitable.

The just result in the cases at bar is clearly indicated in the opinion of Mr. Justice BRADLEY in *Russell* v. *Williams* (106 U. S. 626). The learned Justice was discussing the series of "Cape of Good Hope" statutes which first laid a surtax upon goods imported in non-treaty vessels from beyond Good Hope, and later were evolved into the statute imposing the surtax upon goods the growth or produce of countries east of the Cape of Good Hope, when imported from places west thereof; all reference to vessels being omitted.

"It will be observed," he remarks, "that the first of these laws, which was enacted in 1861, imposed the additional 10 per centum advalorem on goods imported in foreign vessels from beyond the Cape, unless they were exempt from discriminating duties by reciprocal treaty, and goods imported in American ships were *ex industria* exempted from the burden. ***But it is obvious that this law would have failed to reach the object intended, since it would have been a dead letter in all cases where we had reciprocal treaties with other nations placing their ships on equality with our own.***" (Italics inserted.)

This passage is quoted because it applies as well to the case at bar as to the one in which it was used. The law was not held to be a dead letter absolutely, but as to *treaty vessels*. The difference between that case and the present is one of arithmetic; the Cape acts proposed a discrimination by surcharging the regular duties: J subs. 7 proposes a discrimination by denying a discount to any cargoes not coming in American or treaty vessels. That may be thought a clumsy way of doing the thing; but it certainly cannot be held to be an ineffectual way of dividing imported goods into two classes, one of which is to pay 5 per cent. less duties than the other.

To repeat, cargoes imported in American vessels are beyond question entitled at the hands of the Court to 5 per cent. discount in duties.

What other cargoes are entitled to that discount *at the hands of the Court?* The answer is, no others, unless imported in vessels of nations which by act of Congress are granted equal terms with American bottoms. There were statutes of this kind in effect up to October 3, 1913; namely, as to Prussian vessels, under R. S. 4229; French vessels, under R. S. 4228, and proclamation of President Grant, September 22, 1873 (18 Stat. 844), and British indirect vessels, by an earlier proclamation under the same statute. Such cargoes have in the past enjoyed equality of treatment, not under any treaty agreement as to how this Government will treat them, but under specific act of Congress, which is, of course, municipal law, and hence a rule for guidance of courts.

But those statutes must now be held to be repealed. The act of October 3, 1913, grants 5 per cent. discount to American vessels, and it in terms

leaves unaffected all vessels which by treaty have acquired equality of treatment with American vessels. There are excluded from the purview of that statute all vessels except the two named classes. Therefore, every foreign vessel which, by statute, has had equality of treatment, is now excluded from the favor. It is impossible to have in force at the same time a statute which grants to foreign vessels equality of treatment with American vessels, and one which grants to American vessels a 5 per cent. discount. One or the other must fall; and it is elementary that the later in point of time destroys the earlier.

There is no escape, therefore, from the conclusion that J subs. 7 has worked a repeal of the above cited sections of the Revised Statutes.

POINT III.

The status of cargoes of treaty vessels where the treaties are unaided by legislation.

There are in existence also agreements or treaties with a number of nations, which have never been legislated upon, but remain in the form of mutual promises that the parties to them will in future refrain from enacting discriminatory duties.

The ships of such nations have brought cargoes here and claim the discount because the treaties bargain for equality, and because the statute expressly states that J subs. 7 is enacted with the fact in view, that such treaties exist, and are to continue to exist unaffected by that legislation.

The law does not disregard them; and it does not attempt to repeal them; but neither does it

enact them into municipal law or "execute" them, as the phrase goes. It leaves them unaffected—unimpaired.

In 22 Stat. 525, Congress granted free entry to Hawaiian sugar, but declared that nothing in the act should "in any way change or impair the force and effect of any treaty." The effect of that language was argued to this court in *Kelly* v. *Hedden* (124 U. S. 196). It was urged there as here, that by that language the treaty became executed into municipal law. The Court answered the argument by remarking that the most that could be conceded to the provision was that it left a previous treaty relating to the matter unaffected by the Act.

The language of the proviso in J subs. 7, is in every essential, identical with that which the Court considered in *Kelly* v. *Hedden.*

All questions under promissory treaties which have not been executed into law are political questions, and are not cognizable by courts. This proposition was held by Mr. Justice CURTIS, sitting at Circuit, in *Taylor* v. *Morton* (23 Fed. Cas. 784). He then supported his decision with unanswerable logic. His opinion in that case has been time and again quoted by this court, and it constitutes the best argument in existence upon this important question. And in a matter so weighty as the one now at bar, any attempt to reprint adequate extracts from it would but mar the perfection and persuasiveness of the original. Nothing need be said of it in this brief, except to note the fact that this court has never withdrawn its frequently recorded approval of and reliance upon the reasoning of that opinion.

If *Taylor* v. *Morton* still represents the law, and if the Court adheres to the analysis in *Kelly* v. *Hed-*

den of a clause similar to the proviso in J subs. 7, then the principle of the decision of the Board of General Appraisers in these cases is sound. American bottoms are entitled to judgment ordering reliquidation with 5 per cent. discount. Cargoes of vessels which claim under R. S. 4228 *et seq.* should be denied the discount because those sections must be considered repealed, and all other cases ought to be dismissed for lack of jurisdiction.

Thereupon, the questions involved in such cases will be brought before the state department. That department will then set about an adjustment of the matter by determining whether the claimant nations have been living up to the treaty obligations; and if that be found so restitution will, of course, be made.

Necessarily, such procedure will bring into consideration the means by which certain foreign governments have stimulated their merchant marine, and encouraged and favored cargoes shipped in their ships, to the exclusion of the flag of this Government. And if it be found that other nations are using methods not contemplated when these treaties were made, but none the less effective, for discriminating against American ships, that will open the way for a revision of treaties, which will either assure this Government of actual equality in shipping, or else free it from bargains which, as the matter has worked out in practice, have prevented this country from discriminating in favor of national ships, without giving it immunity from being discriminated against.

Discriminations of the weightiest character have been practiced by certain treaty nations in favor of their shipping without resort to discriminating duties. Such duties constituted the only means

of discrimination which the parties had in contemplation at the time of entering into the treaties; since then other nations by means of governmental investment at low rates of interest, and by means of mail subsidies, and by means of marine insurance arrangements, have been able to grant to their own ships precisely the same sort of favors as ship owners would derive from discriminating duties; that is to say, these favors have been so applied as to make it advantageous for shippers to seek out such vessels to load their cargoes in.

These considerations make it clear that in order that J subs. 7 shall result in the largest benefit to American shipping, there must be a revision of our treaties, so as to include therein the new forms of discrimination, which have been developed under new economic conditions. They must be brought down to date so as to be really reciprocal and equal, rather than reciprocal in point of one method of discrimination only (and that a method which European nations do not in any event care to practice).

But, however small the benefit to be conferred on American shipping under the full operation of this statute, it cannot be denied that some cargoes will come here which cannot secure this 5 per cent. discount; new fields of export and import are being now developed as never before; and as to such, the ships of this country will secure freedom from competition by vessels of non-treaty countries, at least.

How great will be the benefit to be immediately obtained by American shipping no one can predict, since the statute has so far been allowed no operation; and it is not of great importance that we should be able to state it. The chief consideration is that the statute gives American ship owners

a confidence that shipping is a matter in which the lawmakers are taking an actual interest. They are given the knowledge that the development of a merchant marine is the subject of earnest and careful inquiry and experiment.

It would be remarkable indeed, if it did not cost some money to reach an intelligent and practical conclusion upon a problem so complicated and so new. This statute is a start upon the way. I am quite ready to concede that it may not be a very long step. The author of the bill, we are told, thought it was only a short step; but we may be assured that without the incentive of some such law as this, the political departments of the Government will never take up a comprehensive treatment of these treaties of an earlier generation, with a view to amending them in terms of modern discoveries and conditions. If this statute be declared self-destructive, the fostering and development of a merchant marine will be thrown back fifty years.

It has been trenchantly stated that a nation cannot have sea power without sea men. This case cannot be better summed up than in those words. In the presence of the overwhelming importance of this subject, the effect of the statute upon the revenue ought not to be mentioned. The fact that the customs revenues will be reduced from an average of say 25 per cent. advalorem to an average of 23.75 per cent. advalorem is of absolutely trifling moment, in the face of the far-reaching policy of this statute.

I have not considered it pertinent to this case to go into geography and import statistics, for the reason that such information is history; and while we can judge the future only in the light of the

past, still it cannot be legally said that this statute is null and void because in the past a given state of affairs has prevailed; indeed, the act was passed for the purpose of remedying and changing that state of affairs.

To say that if the act is given full and literal operation, it will not bring under our flag any vessels would be not a judgment but a prophecy. If, however, it does result in an increase of the American merchant marine, then it is effective in the very way which was planned and hoped for.

Respectfully submitted,

WILLIAM L. WEMPLE.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER, v. THE M. H. PULASKI CO. ET AL.	No. 496.
THE UNITED STATES, PETITIONER, v. R. B. HENRY CO. ET AL.	No. 497.
THE UNITED STATES, PETITIONER, v. JAMES ELLIOTT & CO. ET AL.	No. 498.
THE UNITED STATES, PETITIONER, v. J. WILE SONS & CO.	No. 499.
THE UNITED STATES, PETITIONER, v. ROBERT MULLER & CO.	No. 500.
THE UNITED STATES, PETITIONER, v. WOOD & SELICK ET AL.	No. 501.
THE UNITED STATES, PETITIONER, v. E. LA MONTAGNE'S SONS.	No. 502.
THE UNITED STATES, PETITIONER, v. ALBERT LORSCH & CO. ET AL.	No. 503.

THE UNITED STATES, PETITIONER, v. CULLMAN BROS. ET AL.	No. 504.
THE UNITED STATES, PETITIONER, v. G. W. FABER (INC.).	No. 505.
THE UNITED STATES, PETITIONER, v. LOUIS MEYERS & SON.	No. 506.
THE UNITED STATES, PETITIONER, v. WILLIAM OPENHYM & SONS ET AL.	No. 507.
THE UNITED STATES, PETITIONER, v. PARK & TILFORD.	No. 508.
THE UNITED STATES, PETITIONER, v. SELGAS & CO.	No. 509.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

BRIEF FOR THE UNITED STATES IN REPLY.

In response to the brief on behalf of the respondents the following considerations are submitted:

I.

Respondents overlook the precise terminology of subsection 7, which nowhere grants in terms a discount on imports to any other than American vessels.

The argument of counsel for the respondents is based upon a manifest gloss of the exact words in

which subsection 7 is couched. Nowhere in the subsection is there a grant in express words to any save American vessels. The proviso is in language a mere rule of construction which the respondents seek to convert by inference alone into a supplemental grant. This must be accomplished, if at all, by a showing of congressional intent and not by mere assertion.

We must therefore discredit such phrases as "a discount of five per cent. to American vessels, says the principal clause; and the same to the vessels of Italy, says the proviso" (brief, p. 12); "the Government refuses to accept the subsection as meaning what it says" (brief, p. 23); or "keep within the terms of the enactment, give it the only meaning it can have, and there is in it neither doubt, contradiction, absurdity, nor unwisdom" (brief, p. 46).

These and similar expressions are merely statements of a conclusion which the respondents seek to reach, not of a premise upon which they are entitled to rely.

This tendency to ignore the exact wording of the subsection is accentuated by the reference of counsel to statutes in which language similar to that of the present proviso has been used (brief, point V, p. 37 *et seq.*). No doubt, as counsel say, the phrase "*Provided*, That nothing herein shall be so construed" as to do this or that has been often used.

We are indebted to the brief filed by Messrs. Hatch & Clute as *amici curiæ* for a classification of the func-

tions which such provisos have performed. These are stated (p. 5) to be as follows:

> 1. To carve an exception out of a preceding general provision;
>
> 2. To state a condition upon which the happening of the preceding matter depends;
>
> 3. As an explanation to guard against a misinterpretation of the preceding matter.

Several of the statutory examples cited in the brief for the respondents have been heretofore presented and distinguished in the brief for the Government, pages 48 and 49. Notably among these is section 4, paragraph B, of the present tariff act in reference to the Cuban treaty. It was there pointed out that in each of these cases the proviso was used "to carve an exception out of a preceding general provision." The same thing is true of all the other statutory examples which counsel present. This use, however, instead of being parallel to that for which counsel contend in the instant case, is a direct antithesis.

In all of their illustrative statutes a preceding enactment, broad in terms, would, but for the limitation of the proviso, have applied to the case in question. Thus, in the present tariff act the duties are imposed on goods from all countries. Section 4, paragraph B, is clearly necessary to save rights under the Cuban treaty from the inclusive language of the enacting clause, thus cutting down the meaning of the word "all" to "all except Cuba." In the case at bar, however, counsel seek to so apply the proviso as

not to cut down the grant to American vessels but to extend it to other vessels not even mentioned in terms.

We submit that the words on which this construction can be predicated are lacking.

II.

The burden is upon the respondents to show that the construction proposed by them, not being found in the literal terms of the act, conforms to some rational intent of Congress. The argument of the Government to the contrary is essentially one in rebuttal.

On page 57 of the respondents' brief we read:

> * * * the brief of the Government makes it plain that its whole case rests, directly or indirectly, on the assumption that the benefit from the operation of Subsection 7 will not be so great as might be desired, and that only partial discrimination will result, from which it concludes that the subsection is a nullity.

And, again, page 35:

> The argument against the law is not that it is unintelligible, but that it is unwise; not that it is impracticable, but that it is impolitic.

Much labor has been spent in vain if the brief for the Government can give to any unprejudiced mind this impression of the Government's attitude. We are constrained to think that it can not; and that these and like expressions in counsel's brief are simply an effort to shift from their shoulders to ours a burden whose weight they fully realize.

Of course, the Government does not contend that if Congress had passed an act extending this discount in express language to both American and foreign

shipping the courts should not give it effect because it would be unwise or impolitic to do so. But when Congress has passed by the plain and simple language necessary to accomplish this result, those who would read a similar, though occult meaning into the terms actually employed must connect their interpretation with some purpose fairly imputable to Congress.

As one, and only one, of the factors tending to show that Congress could not in reason have legislated as respondents contend the statistical results of such a law were presented. By a resort to figures it was sought to demonstrate that the possible benefit therefrom to American shipping would not only be so slight in itself but would be obtained at so great cost to the revenue-producing features of the act, and would be so disproportionate to the certain bounty to shippers in vessels of our foreign rivals, as to negative any idea that a rational Congress adopted such a course. Respondents' criticism of the figures so submitted, whether the same be just or unjust, does not weaken the force or certainty of this demonstration.

Although, as the Government said in its brief (p. 60), "the tables make no pretense to absolute accuracy but only estimate reasonable results," certain of the modifications suggested by the respondents should be briefly noted. We take them in the inverse order.

BRITISH TRANSSHIPMENT TRADE.

It is objected that in estimating goods imported direct from Great Britain, and therefore covered by the British treaty ($271,320,331), we have failed to

allow for goods not the product of British territory in Europe but transshipped through the British Isles. In the absence of accurate figures, counsel estimate this amount as 25 per cent of the total. Unquestionably there is such a transshipment trade, and if its amount could be ascertained it should be deducted. No figures on the subject, however, are available. But conceding, *arguendo*, that respondents' estimate is fair, it is still more than offset by the fact, as shown on page 60 of the Government's brief, that no importations whatever in Spanish, Swedish, Danish, Grecian, or Argentinian vessels were included, nor was the effect pressed of those provisions in the tariff act itself that sugar amounting annually to more than $100,000,000 (Com. & Nav., 1914, p. xxii), now paying duty, would be free from duty and hence unaffected by the discount after May 1, 1916. These items far exceed the proposed deduction for the British transshipment trade.

FRENCH IMPORTS IN FRENCH VESSELS.

It is suggested, although the point is not pressed nor argued, that the Court of Customs Appeals was correct in holding that French goods in French bottoms were not protected by treaty. In this connection there has come to our attention since the filing of the Government's main brief certain correspondence between the diplomatic representative of the French Republic and the State Department, which we print as an appendix herewith. The only force of

this correspondence, of course, is to exhibit the firm insistence by the French Government upon the present vitality and protective effect of the French treaty of 1822.

THE PROPER AD VALOREM RATE.

The principal criticism, however, of the figures in the Government's brief is based upon the choice there made of the average *ad valorem* rate to be used in estimating probable duties in the protected and competitive fields. In estimating the duties in the protected field the Government used the average *ad valorem* rate of 14.88 per cent, being that upon all imports, free and dutiable, under the act. In estimating the duties to be paid in the competitive field certain imports on the free list were first deducted from the total and the same average *ad valorem* rate of 14.88 was then applied to ascertain the revenue on the dutiable remainder. This, it is said, is unfair; that either the goods on the free list should have been included in the latter total, or, after their subtraction, the average *ad valorem* on all dutiable goods of 37.60 per cent should have been used to ascertain the revenue on the balance.

This criticism is justified in a measure, and would be entirely so if the other factors in the computation were mathematically accurate.

It must be remembered, however, that the goods in the so-called protected or treaty field come in the main

from European countries, where both the percentage of dutiable goods in the total imports and the average *ad valorem* rate on those dutiable are higher than is the case with imports in gross. Conversely, goods coming from the field unprotected by treaty, or the so-called competitive field, originate in the main outside of Europe, where both the ratio of dutiable to free goods and the average *ad valorem* on those goods subject to duty is lower than the gross average. If the Government's calculation, therefore, is to be nicely adapted to the actual facts a higher average *ad valorem* must be used to ascertain the revenue on those goods in the protected field.

Thus of the total imports from Europe 56.98 per cent were dutiable and only 43.02 per cent on the free list, while of the total imports from all the rest of the world only 25.66 per cent were dutiable; and from Asia, Africa, Oceania, and South America, the real competitive field to be considered, only 13.1 per cent were dutiable.[1]

[1] On page xv, Commerce and Navigation, 1914, the following statistics of total imports appear:

From—	Total.	Free.	Per cent free.
South America	$222,677,075	$216,739,750	97.33
Asia	286,952,486	222,591,248	77.57
Oceania	42,144,398	40,393,524	95.85
Africa	19,149,476	16,372,603	85.50
	570,923,435	496,097,125	86.89

Applying these considerations to the figures before us it is quite fair to assume that at least 50 per cent [1] of the imports in the noncompetitive or protected field would be entitled to the discount; the gross total in this field we have estimated at $1,084,013,731 (brief, p. 61); 50 per cent of this sum would be $542,006,865; and at the average *ad valorem* dutiable rate of 37.60 per cent (which is unquestionably

[1] As nearly as we can calculate, if we must have mathematical exactness, this percentage is accurate. From the tables on pp. xiv, xv, and 298–300, Commerce and Navigation for 1914, the following facts appear: For the year reported $743,450,897 of imports were carried *from Europe* in existing American and treaty ships entitled to the 5 per cent discount. Of this 56.98 per cent was dutiable, or *$423,618,321*. Similarly, existing American and treaty bottoms brought $150,695,816 imports from North America, of which amount American, Norwegian, and German vessels brought from Cuba $77,258,664, from Canada $20,801,506, and from Mexico $30,516,913, or from Cuba, Canada, and Mexico together $128,577,083. The percentage of dutiable goods from Cuba is 93.99 per cent, from Canada 28.40 per cent, from Mexico 9.62 per cent; so the total dutiable goods from Cuba was $72,615,418, from Canada $5,907,627, and from Mexico $2,935,727, making a total of *$81,458,772* as the total dutiable goods *from Cuba, Canada, and Mexico*. The remaining imports from North America in treaty and American ships ($22,118,733) may be disregarded as being practically free from duty. Of the balance of the imports brought by American and treaty bottoms from the rest of the world, *i. e.*, $189,867,018 *from Oceania, Asia, Africa, and South America*, 13.1 per cent was dutiable, or *$24,872,579*. The total dutiable imports in the protected field, therefore, is *$423,618,321*, plus *$81,458,772*, plus *$24,872,579*, or *$529,949,672*. This is approximately one-half, or 50 per cent of the total imports in American and treaty bottoms entitled to the discount, viz., $1,084,013,731.

too low for the protected field), the total duty on these goods would be $208,794,581; and 5 per cent thereof $10,189,729. The certain sacrifice of revenue, therefore, instead of the $8,065,062 (p. 60), heretofore given, would be more accurately estimated at $10,000,000 or more.

Coming back to the competitive field, it must be noted that the free goods which were subtracted therefrom are only those coming in British vessels. It is not to be assumed that the balance of $254,231,589 (Government's brief, p. 60) was altogether dutiable. As above stated, only 25.66 per cent of the total imports from all the rest of the world outside of Europe are dutiable, and, dropping the fractions, 25 per cent may be assumed as a liberal figure in estimating the total dutiable goods in the competitive field. The total competitive field being not more than $653,694,922 (Government's brief, p. 61), the dutiable portion thereof, or 25 per cent, would be $163,423,730. Adopting without further debate the average *ad valorem* rate on dutiable imports of 37.60 per cent (in this instance too high), the duties on this total would be $61,447,322, 5 per cent of which is $3,072,366.

This figure, therefore, instead of the $4,863,490 claimed by the respondents (brief, p. 61), more nearly approximates the total possible benefit in the competitive field.

In their effort to swell the possible discount to be paid in the competitive field the respondents have

overreached themselves in still another particular. It was shown in the Government's brief (pp. 59–61) that goods valued at $193,424,634 were imported during the year ending June 30, 1914, in American vessels. The duties on this sum (using the average *ad valorem* rate of 14.88) would be $28,781,585, and 5 per cent thereon $1,439,079. This item, the respondents insist, should be added to the total discount possible from the competitive field and the aggregate listed as the possible benefit to American ships. But respondents overlook the fact that the payment is one not to the vessel owners but to the importers. It is not a direct subsidy, and the advantage to the merchant marine is to come from increased freights. To allow a discount of 5 per cent on goods already traveling in American bottoms is of course no encouragement to the American marine. The purpose of the bill (as respondents construe it) is not to be generous to our present customers but to attract new ones. The discount on existing shipments in American vessels is therefore properly included by us in that certain outlay which can produce no corresponding benefit.

But there is surely no great profit in debating whether the amount of the 5 per cent discount on all imports in the competitive field would be $2,000,000 (Government brief, p. 60), $3,500,000 (*supra*, p. 11), or $4,865,000 (respondents' brief, p. 61). On the one hand, the amount, though certainly much less than that in the protected field, must of necessity

be a matter of mere estimate, and on the other it remains to be shown that, whether great or small, it is the American marine which will be helped by it. It must not be forgotten that in any port where an American vessel can drop her anchor and offer this discount as a bid for trade she will find either ahead of or alongside her a German, Dutch, Norwegian, Swedish, Danish, Japanese, Belgian, Italian, Spanish, Austrian, or Greek merchantman ready to make the same or better terms.

The facts and figures do, however, lead us irresistibly to these conclusions:

(1) The discount, if offered to importers in American and treaty vessels alike, affords to the former no advantage whatever over their far more numerous treaty rivals.

(2) Whatever the total discount in the competitive field, whether $2,000,000 or $4,865,000, the share of the American merchant marine therein would be certainly problematical and in reality unsubstantial.

(3) In order to grant this phantom favor there must first be a certain annual donation from the revenues of from $8,000,000 to $10,000,000, by far the greater part of which must go to importers in foreign bottoms.

(4) Even if the impossible could happen and American ships could receive the benefit of the total discount in the competitive field, no Congress framing a bill "to provide revenues for the Government" is to be charged by mere inference on doubtful language with having chosen a plan so costly and irrational.

CONCLUSION.

The true explanation of subsection 7 is to be found in the facts of its legislative history. This shows that apt words were used on behalf of two opposed branches of the legislative assembly to express purposes wholly irreconcilable. Such a union must of necessity be barren of result. A frank recognition of this fact, it is submitted, solves all the difficulties of the case.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1916.

APPENDIX A.

Correspondence between the French Ambassador and the Secretary of State with reference to present vitality of the treaty with France of 1822.

[Translation.]

EMBASSY OF THE FRENCH REPUBLIC
TO THE UNITED STATES,
Washington, September 4, 1915.

Mr. SECRETARY OF STATE:

The Court of Customs Appeals some time ago issued a decree stating that the 5 per cent rebate on merchandise imported into the United States in American bottoms was also applicable to that imported under the flag of powers bound to the United States by treaties which would be violated if that advantage were denied them.

The decree of the court withholds that favor from France and grants it to all the other great maritime nations in the world. I need not describe to your Excellency the impression which is likely to be created in France by a construction of the act of 1913 that would lay in store such hardships for France alone among the leading maritime countries.

My countrymen are all the more painfully and keenly surprised, as it is certainly inaccurate in my Government's opinion to say that, for lack of a treaty, France may have to bear this discrimination. Quite to the contrary, she has one and, what is not the case with many other countries, one dealing specially

with that question, signed in 1822 and intended solely to abrogate, on both sides, the old mediæval institution known as the "surtaxe de pavillon" (foreign discriminating duties) which would be restored if the aforesaid decree were put into effect.

The scope of that treaty was clearly indicated in the note which, by order of my Government, I had the honor to address to the Department of State on October 11, 1913.

The judges who on pages 10 *et seq.* of their decree, cite a letter from Mr. Bassett Moore in which France is alluded to (page 12) appear to be inaccurately informed on the true situation. They assert (p. 23) that the articles of the treaty which would entitle us to equal treatment are obsolete. But my note above referred to shows, on the contrary, that they are not unprofitable to the American trade since it is by virtue of that provision, duly quoted in the preliminary remarks on the French Customs Tariff that are now in force, that the American flag is placed on the same footing as the French flag in our country.

As the judicial decree under consideration is not final, my Government firmly hopes that it will be revised in the part that concerns us and that which we should look upon as a grave injustice, in fact and in law, and for which, in addition, not even an excuse could be found in the treatment we accord to the American flag will be averted.

Be pleased to accept, Mr. Secretary of State, the assurances of my highest consideration.

JUSSERAND.

No. 1625.

DECEMBER 15, 1915.

EXCELLENCY:

I have the honor to acknowledge the receipt of your note of September 4, 1915, relative to the question of the duties which, under the stipulations of the tariff act, should be levied upon goods coming to the United States in French vessels.

In reply I have the honor to say that the Department has given careful consideration to the statements contained in Your Excellency's note with respect to the interpretation by the United States Court of Customs Appeals of the treaty concluded June 24, 1822, between this Government and the Government of France and has likewise considered the views expressed in the Embassy's note of October 11, 1913, which are at variance with the construction given by the court to Articles I, II, and VII of the treaty.

The Department understands that it is the view of Your Excellency's Government that, although Article VII by its express terms makes provision merely for the gradual and final abolition of the discriminatory duties provided for by Articles I and II, the effect of Article VII is the same as if the treaty had contained a stipulation expressly providing for reciprocal equality in the matter of duties imposed on the cargoes of vessels of each government in the ports of the other.

In view of the fact that, as the Department has observed Your Excellency is aware, the decision of the United States Court of Customs Appeals is not that of a court of last resort, and in view of the fact that the case is now pending before the Supreme Court of the United States, the Department would prefer not to express any opinion at the present time respecting

the questions under consideration which, it is hoped, may soon be settled by a final decision from that branch of the Government which has the ultimate right to pass on them.

Accept, Excellency, the renewed assurances of my highest consideration.

ROBERT LANSING.

[Translation.]

EMBASSY OF THE FRENCH REPUBLIC
TO THE UNITED STATES,
Washington, January 19, 1916.

Mr. SECRETARY OF STATE:

By your letter of December 15, answering my communication of September 4, Your Excellency was pleased to tell me that the question of the rate of customs duties to be collected under the tariff in force on merchandise brought to the United States by French vessels was now before the Supreme Court, and that the Department of State deemed it proper not to advance, pendente lite, any opinion as to the inferences to be drawn in this respect from the provisions of the treaty of June 24, 1822, between France and the United States.

As stated in my letters of October 11, 1913, and September 4 last, my Government does not see how there can be any doubt as to the operation of that treaty which is still in force in the opinion of both States and from which the American trade in particular still derives benefits with respect to its shipments to France.

In order to make the manner in which the question is put quite clear to the Supreme Court, I venture to suggest that that High Tribunal be given the

opportunity to know exactly the reasons that justify our view of the case. I notice that the Court of Customs Appeals, whose decree is now before the Supreme Court, rendered a decision adverse to our interests and, as we see it, to equity without exactly knowing on what arguments the Government of the Republic stands. Unless I am mistaken, but a brief allusion to those difficulties made in one note from the Embassy, dated April 24, 1913, and dealing with the Administrative regulations of the new tariff as a whole, was submitted to the Court, quoted in a letter of May 28, 1913, from Mr. Moore, then Counselor of the Department of State, and reproduced on page 12 of the decree. But that quotation merely points to the untoward and unavoidable consequences to the trade of both Countries which a decision excluding us practically alone from the contemplated benefits would involve. The reasons and arguments in support of our views expounded in my note of October 11, 1913, to the Department of State were not, so far as I am to believe, imparted to the judges. I would consider it important to inform the High Court now in charge of the case of the reasons why the Government of the Republic can not but adhere most expressly to the views previously formulated by it. I should be very thankful to Your Excellency if you would kindly take suitable steps to have favorable action taken on the request I hereby have the honor to lay before you.

Be pleased to accept, Mr. Secretary of State, the assurances of my high consideration.

JUSSERAND.

His Excellency the Hon. ROBERT LANSING,
Secretary of State of the United States.

O

FIVE PER CENT DISCOUNT CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PETITIONER, *v.* THE M. H. PULASKI CO. ET AL.	No. 496.
THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.	No. 497.
THE UNITED STATES, PETITIONER, *v.* JAMES ELLIOTT & CO. ET AL.	No. 498.
THE UNITED STATES, PETITIONER, *v.* J. WILE SONS & CO.	No. 499.
THE UNITED STATES, PETITIONER, *v.* ROBERT MULLER & CO.	No. 500.
THE UNITED STATES, PETITIONER, *v.* WOOD & SELICK ET AL.	No. 501.
THE UNITED STATES, PETITIONER, *v.* E. LA MONTAGNE'S SONS.	No. 502.
THE UNITED STATES, PETITIONER, *v.* ALBERT LORSCH & CO. ET AL.	No. 503.
THE UNITED STATES, PETITIONER, *v.* CULLMAN BROS. ET AL.	No. 504.

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THE UNITED STATES, PETITIONER, v. G. W. FABER, INC.	No. 505.
THE UNITED STATES, PETITIONER, v. LOUIS MEYERS & SON.	No. 506.
THE UNITED STATES, PETITIONER, v. WILLIAM OPENHYM & SONS ET AL.	No. 507.
THE UNITED STATES, PETITIONER, v. PARK & TILFORD.	No. 508.
THE UNITED STATES, PETITIONER, v. SELGAS & Co.	No. 509.

ON WRITS OF CERTIORARI TO THE COURT OF CUSTOMS APPEALS.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General on behalf of the United States and respectfully moves the court to advance these causes for hearing on a day convenient to the court during the present term.

The cases are before the court on writs of certiorari to review judgments of the Court of Customs Appeals in what are known as the "Five Per Cent Discount Cases." They involve the construction of the act entitled "An act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, and particularly Section IV, paragraph J, subsection 7

thereof, 38 Stat. 114, 192, 196. This subsection is as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided,* That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

Treaties of "commerce and navigation" between the United States and most of the leading commercial nations of the world guarantee to the high contracting parties, their products and vessels, reciprocal immunity from discriminating duties.

Claims to the reduction of 5 per cent on duties otherwise imposed by the act were preferred by importers of goods in vessels admitted to registration under the laws of the United States, and by importers of goods in vessels registered under the laws of treaty nations. All claims were rejected by the customs officers upon advice of the Attorney General to the Secretary of the Treasury. The Board of General Appraisers allowed the discount to the importers in American bottoms. On appeal, majority of the Court of Customs Appeals held that all claimants were entitled to the 5 per cent discount. De Vries, J., dissenting, was of opinion that so long as the treaties guaranteeing reciprocal

immunity from discrimination were in force the discount should not be allowed at all.

The cases are class cases, representative of a multitude of similar claims. The great majority of imports are transported to this country in bottoms of the treaty nations. The questions involved are of general public interest and of importance to the revenues.

Opposing counsel concur in this motion.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1915.

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FIVE PER CENT DISCOUNT CASES.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER,
v.
THE M. H. PULASKI CO. ET AL. } No. ———.

THE UNITED STATES, PETITIONER,
v.
R. B. HENRY CO. ET AL. } No. ———.

THE UNITED STATES, PETITIONER,
v.
JAMES ELLIOTT & CO. ET AL. } No. ———.

THE UNITED STATES, PETITIONER,
v.
J. WILE SONS & CO. } No. ———.

THE UNITED STATES, PETITIONER,
v.
ROBERT MULLER & CO. } No. ———.

THE UNITED STATES, PETITIONER,
v.
WOOD & SELICK ET AL. } No. ———.

THE UNITED STATES, PETITIONER,
v.
E. LA MONTAGNE'S SONS. } No. ———.

THE UNITED STATES, PETITIONER,
v.
ALBERT LORSCH & CO. } No. ———.

THE UNITED STATES, PETITIONER,
v.
CULLMAN BROS. ET AL. } No. ———.

THE UNITED STATES, PETITIONER,
v.
G. W. FABER. } No. ———.

THE UNITED STATES, PETITIONER,
v.
LOUIS MEYERS & SON. } No. ———.

THE UNITED STATES, PETITIONER,
v.
WILLIAM OPENHYM & SONS. } No. ———.

THE UNITED STATES, PETITIONER,
v.
PARK & TILFORD. } No. ———.

THE UNITED STATES, PETITIONER,
v.
SELGAS & CO. } No. ———.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CUSTOMS APPEALS, AND BRIEF IN SUPPORT.

The United States prays for writs of certiorari to the Court of Customs Appeals to review the decision and judgments of that court rendered on the 26th day of May, 1915, in the above-styled fourteen cases, which are known as the "Five Per Cent Discount Cases."

CHARACTER OF CASES.

These are appeals from decisions of the Board of General Appraisers, taken by the United States and by sundry importers, respectively, to the Court of Customs Appeals. They involve the interpretation and construction of section IV, paragraph J, subsection 7, of the act entitled "An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913. 38 Stat. 114, 192, 196. This section is as follows:

> That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

The treaties so referred to are those commonly entitled treaties of "commerce and navigation" now in existence between the United States and most of the nations of the world, which guarantee to the high contracting parties, their products and vessels reciprocal immunity from discriminating duties.

There is also involved the treaty between Cuba and the United States of December 11, 1902, 33 Stat. 2136, granting to merchandise imported from Cuba a preferential reduction of 20 per cent on the normal

tariff rates, and guaranteeing to similar articles of both countries equal treatment in their respective ports.

CLASSES OF CLAIMS.

Under this statute and these treaties claims to the reduction of 5 per cent on duties otherwise imposed by the act are preferred by four classes of claimants.

First. Importers of goods in vessels admitted to registration under the laws of the United States. (Such are the foregoing cases of *The United States* v. *J. Wile Sons & Co.; The United States* v. *G. W. Faber; The United States* v. *Louis Meyers & Son; The United States* v. *William Openhym & Sons; The United States* v. *Park & Tilford;* and *The United States* v. *Selgas & Co.*)

Second. Importers of goods in vessels registered under the laws of treaty nations. (Such are the cases of *The United States* v. *The M. H. Pulaski Co. et al.; The United States* v. *R. B. Henry Co.; The United States* v. *James Elliott & Co. et al.; The United States* v. *Robert Muller & Co.; The United States* v. *Wood & Selick et al.; The United States* v. *E. La Montagne's Sons; The United States* v. *Cullman Bros. et al;* and *The United States* v. *Albert Lorsch & Co. et al.*)

Third. Importers of goods brought into the United States before the 3d day of October, 1913, entered without payment of duty and under bond for warehousing; this merchandise being, in turn, of two classes, (*a*) that imported in vessels of United States

registry and (*b*) that imported in vessels of treaty nations. (Such are the cases of *The United States* v. *Wood & Selick et al.*; *United States* v. *James Elliott & Co. et al.*; *The United States* v. *Cullman Bros et al.*)

Fourth. Importers of Cuban goods in American bottoms, who claim in addition to the 20 per cent reduction provided by the Cuban treaty the 5 per cent discount allowed by the section in question. (Such are the cases of *The United States* v. *G. W. Faber*; *The United States* v. *Park & Tilford*; *The United States* v. *Selgas & Co.*)

The Secretary of the Treasury, upon advice of the Attorney General, directed the customs officers to reject claims of any and all these classes.

The Board of General Appraisers sustained the contentions of those claimants of the first and fourth classes; but overruled the contentions of claimants of the second and third classes. The Court of Customs Appeals sustained the contentions of all claimants.

The United States contends that the action of the Secretary of the Treasury was correct, and that to none of these various classes of claimants can the 5 per cent discount be allowed.

BRIEF.

I.

The sole purpose of Congress in the section under discussion was to develop an American merchant marine by means of discriminating duties on goods carried in American bottoms.

This clearly appears from the legislative history of the act.

As introduced by Mr. Underwood in the House on April 7, 1913, the paragraph in question read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares and merchandise as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen thereof.

When the bill was next ordered printed, on or about April 21, the section read:

> Subsection 7. That a discount of 5 per centum on all duties imposed by this act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States.

The subsection was in this form when the bill was finally sent to the Senate. The explanation given concerning it in the Report of the Ways and Means Committee (Report No. 5; 63d Cong., 1st sess.), April 22, 1913, is as follows:

> Subsection VII of Paragraph J is new legislation providing that a discount of 5 per cent.

> on all duties imposed at the custom houses shall be allowed on such goods, wares and merchandise as shall be imported in vessels admitted to registration under the laws of the United States. It is a discrimination in favor of American shipping, similar to the provisions of some of the first tariff bills that were enacted by the Congress of the United States. Under like legislation the merchant marine of the United States was encouraged and developed in the early decades of the last century until our merchant marine became the largest carrier of merchandise in the world. We believe that to again discriminate in favor of American shipping will build up our merchant fleet and keep at home millions of dollars that are now being paid to foreign vessels to carry the products of our country to foreign markets. (Report No. 5, 63d Cong., 1st Sess., page LII (to accompany H. R. 3321).

On July 18, 1913, the Finance Committee of the Senate reported the bill, with the recommendation that it do pass as amended (Cong. Rec., vol. 50, pt. 3, pp. 2507–2515). Among other changes, the committee struck out the entire subsection 7, accompanying their action with the following explanation:

> Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent. on all duties upon goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revoca-

tion, and was very properly protested against by the high contracting parties with whom we had the treaties. In our opinion, it would have led to no good result, as every other country could have retaliated, and all the countries at the end would have been just about where they started. Moreover the country which could use that principle with most force and effect in injuring other countries would be the country with the largest merchant marine, and the country which could least effectively use it would be the country with the smallest merchant marine. We were therefore not only inviting an endless retaliation but a retaliation where our opponents would have had in nearly every case the better of it, and in many cases infinitely the better. [Cong. Rec., vol. 50, pt. 3, p. 2515; see also pt. 5, p. 4494.]

The bill was accordingly returned to the House with the subsection entirely stricken out. In conference an effort was made to reconcile the difference between the two Houses, and the subsection was cast in its present form, and in that form was finally enacted.

II.

The Congressional purpose of favoring American bottoms is obstructed by treaty provisions to the contrary. These Congress determined to respect and by the proviso it suspended, if it did not nullify, the grant to American bottoms.

On October 3, 1913, we had, and still have, treaties of commerce and navigation with almost all of the

important commercial countries of the globe, guaranteeing to their ships and cargoes when entering our ports the same treatment as we give to our own. The list comprises the following:

> Argentine Republic, Austria-Hungary, Belgium, Bolivia, China, Colombia, Corea, Costa Rica, Denmark, France, Germany, Great Britain, Greece, Honduras, Italy, Japan, Liberia, The Netherlands, Norway, Paraguay, Spain, and Sweden.

The treaty with Italy dated November 18, 1871, is a typical illustration of these guarantees. Article V of the same reads as follows:

> The high contracting parties agree that whatever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into the United States, in their own vessels, may be also imported in Italian vessels; that no other or higher duties upon the tonnage of the vessel or her cargo shall be levied and collected whether the importation be made in vessels of the one country or the other; and, in like manner, that whatsoever kind of produce, manufactures, or merchandise of any foreign country can be from time to time lawfully imported into Italy in its own vessels may be also imported in vessels of the United States, and that no higher or other duties upon the tonnage of the vessel or her cargo shall be levied and collected, whether the importation be made in vessels of the one country or of the other; and they further agree that whatever

> may be lawfully exported and reexported from the one country, in its own vessels, to any foreign country, may in the like manner be exported or reexported in the vessels of the other country, and the same bounties, duties, and drawbacks shall be allowed and collected, whether such exportation or reexportation be made in vessels of the United States or of Italy.

In addition, we have treaties of commerce with even such small countries as Congo, Muscat, Morocco, Tripoli, Ethiopia, Persia, Servia, and Tonga, whereby we have in effect obligated ourselves to treat their commerce as well as that of the most favored nation. Perhaps the most important countries with which we have no such treaties are Brazil, Bulgaria, Chile, Uruguay, Venezuela, Nicaragua, Mexico, Portugal, Roumania, and, since 1911, Russia.

The claimants in the cases at bar rely upon treaties existing with Great Britain, the German Empire (or its constituent States), Norway and Sweden, Austria-Hungary, The Netherlands, Italy, Belgium, Japan, and Spain.

Congress, as shown by the report of the Senate above quoted, was fully advised of the purport and existence of these treaties. Pending debate on the bill, a resolution of the Senate called upon the Secretary of State to transmit to the Senate copies of all objections or protests made by foreign nations against the adoption of the paragraph as enacted by the House, and such documents were transmitted. (See

Senate Doc. No. 179, 63d Cong., 1st Sess.) It appeared that 29 nations had protested. (Cong. Rec., vol. 50, pt. 5, p. 4497.)

The Senate shrank from such a disturbance of our treaty relations, and so insisted upon the addition of the proviso, the effect of which, as the Government contends, is either to nullify the clause altogether by rendering it impossible of performance, or to postpone the preference to American bottoms until our treaty relations can be modified so as to permit it.

III.

Goods in treaty bottoms are not entitled to the discount because by the intent of Congress and the express language of the act the grant is confined to American bottoms.

Neither in the language of the act nor in its legislative history is there any indication of a desire on the part of Congress to grant this discount to goods entering in vessels of any other than American registry.

The Board of General Appraisers and the minority of the Court of Customs Appeals so considered; but, holding that these treaties of commerce and navigation were promissory only, executory and not self-executing, they found the grant to American bottoms unimpeded by the existence of the treaties. The majority of the Court of Customs Appeals, on the other hand, held the treaties to be self-executing, and a legislative declaration against abrogating, impairing, or affecting them to be tantamount to an express grant of 5 per cent discount to treaty bottoms.

But Congress in what seem unmistakable terms, and for a definite purpose, confined the discount to American bottoms. It can not be supposed that it intended at the next moment to destroy the entire economic and maritime effect of this discrimination by granting a like privilege to practically all the great trading nations of the world.

IV.

Goods warehoused prior to October 3, 1913, are not entitled to the discount for the foregoing reasons, and for the further reason that the discount is granted to future importations only.

This appears from the language of subsection 7, which is that the discount shall be allowed on goods which "shall be imported," clearly implying a future importation.

It is true that paragraph Q of Section IV of the tariff act of 1913 provides that goods in warehouse "shall be subjected to the duties imposed by this act and to no other duty, upon the entry or the withdrawal thereof;" but paragraph J, subsection 7, now under consideration, does not impose a duty, but grants a reduction for certain considerations having to do with future events. It is prospective only.

V.

Cuban goods, whether imported in American or Cuban bottoms, are not entitled to the discount.

The treaty with Cuba of December 11, 1902, 33 Stat. 2136, in addition to certain specific reductions, grants a general reduction of 20 per cent on

products of the soil or industry of Cuba imported into the United States; but by Article VII of the same treaty it is agreed that similar articles of both countries shall receive equal treatment on their importation into the ports of the United States and the Republic of Cuba, respectively. The Government contends that the reduction of 20 per cent exhausts the privilege to which such goods are entitled, and to add thereto a discount of 5 per cent on American entry which would not be enjoyed by American goods entering a Cuban port would be to abrogate, impair, or affect the reciprocal provisions for equal treatment found in Article VII of the treaty.

VI.

If no precise or intelligible meaning consistent with the manifest intention of Congress can be given to paragraph J, subsection 7, premise and proviso, it must be held to be void and of no effect.

If the initial clause and the proviso of this section are irreconcilable and mutually destructive, the statute is void.

Notwithstanding the customary presumptions in favor of the validity of a legislative act, it will not do to abandon the legislative intent in order that a forced meaning may be substituted. Better that the words used should be declared inadequate for the purpose intended than that interpretation should usurp the function of legislation.

REASONS FOR THE WRIT.

The cases at bar are believed to have had much to do with the passage of the act amending section 195 of the Judicial Code, approved August 22, 1914. (Public No. 180, 63d Cong., 2d Sess.)

In accordance with that act, the Attorney General, before the decision of the Court of Customs Appeals was rendered, filed in each case a certificate to the effect that the case was of such importance as to render expedient its review by the Supreme Court. It is manifest, moreover, that there are drawn in question sundry treaties made pursuant to the Constitution of the United States. The cases are class cases, representative of a multitude of similar claims. The questions involved are of general importance and of great consequence to the public revenues.

It is respectfully submitted that writs of certiorari should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

JUNE, 1915.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PETITIONER, *v.* THE M. H. PULASKI CO. ET AL.	No.____
THE UNITED STATES, PETITIONER, *v.* R. B. HENRY CO. ET AL.	No.____
THE UNITED STATES, PETITIONER, *v.* JAMES ELLIOTT & CO. ET AL.	No.____
THE UNITED STATES, PETITIONER, *v.* J. WILE SONS & CO.	No.____
THE UNITED STATES, PETITIONER, *v.* ROBERT MULLER & CO.	No.____
THE UNITED STATES, PETITIONER, *v.* WOOD & SELICK ET AL.	No.____
THE UNITED STATES, PETITIONER, *v.* E. LA MONTAGNE'S SONS.	No.____

THE UNITED STATES, PETITIONER,
v.
ALBERT LORSCH & CO. } No.....

THE UNITED STATES, PETITIONER,
v.
CULLMAN BROS. ET AL. } No.....

THE UNITED STATES, PETITIONER,
v.
G. W. FABER. } No.....

THE UNITED STATES, PETITIONER,
v.
LOUIS MEYERS & SON. } No.....

THE UNITED STATES, PETITIONER,
v.
WILLIAM OPENHYM & SONS. } No.....

THE UNITED STATES, PETITIONER,
v.
PARK & TILFORD. } No.....

THE UNITED STATES, PETITIONER,
v.
SELGAS & CO. } No.....

BRIEF OPPOSING PETITION FOR CERTIORARI.

Statement.

It is submitted on behalf of the Respondents that no writ should be granted, as prayed for herein.

The United States seeks to review a judgment of the United States Court of Customs Appeals, created by Section 29 of the Tariff Act of August 5, 1909 (36 U. S. Stat., 11). The petition

is filed pursuant to the Act of August 22, 1914, amending Sec. 195 (Act of March 3, 1911, 63d Cong., 2d Sess., Ch. 367), which provides:

"An act to amend section one hundred and ninety-five of the Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one hundred and ninety-five of an Act entitled 'An Act to codify, revise, and amend the laws relating to the judiciary,' approved March third, nineteen hundred and eleven, be, and hereby is, amended so as to read as follows:

"SEC. 195. That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases; Provided, however, That in any case in which the judgment or decree of the Court of Customs Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court, upon the petition of either party, filed within sixty days next after the issue by the Court of Customs Appeals of its mandate upon decision, in any case in which there is drawn in question the construction of the Constitution of the United States, or any part thereof, or of any treaty made pursuant thereto, or in any other case when the Attorney General of the United States shall before the decision of the Court of

Customs Appeals is rendered, file with the court a certificate to the effect that the case is of such importance as to render expedient its review by the Supreme Court, to require, by *certiorari* or otherwise, such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court: And provided further, That this Act shall not apply to any case involving only the construction of section one, or any portion thereof, of an Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August fifth, nineteen hundred and nine, nor to any case involving the construction of section two of an Act entitled 'An Act to promote reciprocal trade relations with the Dominion of Canada, and for other purposes,' approved July twenty-sixth, nineteen hundred and eleven."

Approved, August 22, 1914.

The issue here involved turns upon the interpretation to be given Section 4, Paragraph J, Sub-section 7 of the Tariff Act of 1913 (63d Cong., 1st Sess., Ch. 16), to wit:

> "That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation."

The existing tariff law became effective on October 3, 1913. The Government theory of interpretation is accurately reflected by the official letter of instructions of the Secretary of the Treasury addressed to collectors and other officers of

customs dated November 8, 1913. It is printed in Treasury Decisions, 33847:

"Discount on duties imposed on merchandise imported in American vessels.

Instructions in T. D. 33782 to make no allowance of discount on duties under subsection 7 of paragraph J of section 4, tariff act of 1913, made permanent following the opinion of the Attorney General.

TREASURY DEPARTMENT, November 8, 1913.

To collector and other officers of the customs:

The Attorney General having been asked for an expression of his views upon the interpretation of subsection 7 of paragraph J of section 4 of the tariff Act of October 3, 1913, he advises the department that the 5 per cent. discount to American vessels only, which was the primary object of the subsection, can not be given without impairing the stipulations of existing treaties between the United States and various other powers and that consequently the subsection, by the express terms of the proviso, is inoperative.

Under these circumstances you are hereby instructed to make no allowance of discount on duties under the subsection in question and to proceed with liquidation of entries leaving importers who are dissatisfied with such liquidations to their remedy by way of protest under the provisions of paragraph N of section 3 of the said tariff act.

W. G. MCADOO,
Secretary.

We set forth Articles 3 and 4 of the treaty of 1829 with Austria-Hungary, cited by the Board of General Appraisers in its opinion, as typical of the treaty provisions here drawn in question:

ART. III.

"All kinds of merchandise and articles of commerce, either the produce of the soil or the industry of the

United States of America, or of any other country, which may be lawfully imported in the ports of the dominions of Austria, in Austrian vessels, may also be so imported in vessels of the United States of America, without paying other or higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in Austrian vessels. And, reciprocally, all kinds of merchandise and articles of commerce, either the produce of the soil or of the industry of the dominions of Austria, or of any other country, which may be lawfully imported into the ports of the United States, in vessels of the said States, may also be so imported in Austrian vessels without paying other higher duties or charges, of whatever kind or denomination, levied in the name or to the profit of the Government, the local authorities, or of any private establishments whatsoever, than if the same merchandise or produce had been imported in vessels of the United States of America."

ART. IV.

"To prevent the possibility of any misunderstanding, it is hereby declared that the stipulations contained in the two preceding articles are, to their full extent, applicable to Austrian vessels and their cargoes arriving in the ports of the United States of America; and, reciprocally, to vessels of the said States and their cargoes arriving in the ports of the dominions of Austria, whether the said vessels clear directly from the ports of the country to which they respectively belong, or from the ports of any other foreign country. (Treaties, Conventions, International Acts, Protocols, and Agreements, between the United States and Other Powers, 1776–1909, vol. 1, p. 30; 8 Stat. L., 228)."

Any review of the character of the cases here sought to be reviewed is rendered superfluous by the analysis of the Solicitor-General on pages 3 *et seq.* of his brief.

BRIEF.

The House is not to be confused with Congress. Conceding freely that the House sought in passing the main body of Sub-section 7 to discriminate in favor of American bottoms, the action of Congress in finally adopting the proviso as the outcome of a dispute between the House and the Senate, duly approved by the Executive, clearly evinces a legislative determination to favor American shipping in a way consistent with our solemn treaty obligations. In other words, the proviso recognizes, ratifies, and adopts as the law of the land the obligations which the treaties impose upon us with respect to equal treatment of cargoes imported in foreign treaty bottoms, and therefore the discount should be allowed to goods imported in vessels of American registry and in vessels of treaty nations.

It is unnecessary to duplicate the recital of the Solicitor-General as to what occurred in the House. It appears from Senate Document No. 179, 63rd Cong., 1st Session, that after the Bill passed the House the Secretary of the Treasury, on May 26th, 1913, inquired of the Secretary of State :

> " It has been pointed out to me, directly and indirectly, that this provision may result in the violation of many of our treaties with foreign nations, and is almost sure to result in international complications and diplomatic negotiations. Consequently, I earnestly suggest the advisability of submitting to the counselor for the State Department, or such other officer as you may deem proper, the question as to whether or not this provision is in violation of any existing treaty rights."

and to this John Bassett Moore, then Counselor of the State Department, answered the Secretary as follows:

> "The various stipulations above quoted suffice to show the purport of the treaty provisions with which the proposed subsection is alleged to conflict. This allegation appears to be well founded if, as seems to be the case, it is intended by the subsection to allow the discount on duties only on merchandise imported in American registered vessels. Governments having treaty stipulations with the United States such as those above quoted probably would not object to the discount if it were extended, in conformity with those stipulations to merchandise imported into the United States in their respective vessels; but they would not acquiesce in discriminatory levy of lower duties on goods imported into the United States in American registered vessels because it was called a discount. It is the fact that a lower duty is charged, and not the term by which the reduction is described, with which the department is obliged to deal."

Thereafter, on July 18, 1913, the Finance Committee of the Senate reported the Bill with this comment, as appears from page 7 of the Solicitor General's brief:

> "Your committee struck out subsection 7 of paragraph J, page 263, giving a discount of 5 per cent. on all duties upon all goods imported in American bottoms. The provision was in contravention of some 19 or 20 treaties of the United States, without having been preceded by the courtesy of a notice of revocation, and was very properly protested against by the high contracting parties with whom we had the treaties."

Subsequently after the Bill had passed the Senate and had gone to Conference, the Solicitor of the State Department transmitted to Chairman Simmons of the Finance Committee a communication in which he called attention to the commer-

cial treaties between this Government and other nations which contain "provisions securing for the citizens and subjects of each of the contracting powers reciprocal equity in the matter of duties imposed on the cargoes of the vessels of each country in the ports of the other." He gave a list of such treaties and also called attention to the narrower and more restricted scope of the British treaty of 1815 (See Cong. Rec., Vol. 50, Part 6, pp. 5345, 5346). In the light of this brief survey, unless we impute to Congress an intention to do a vain and meaningless thing, how can it be said that the intent of the proviso was other than to recognize, ratify, and adopt as the law of the land the obligations which the treaties impose upon us with respect to equal treatment of cargoes imported in foreign treaty bottoms. This is accomplished by a section of an act originating in the House of Representatives, amended in the Senate, passed by both Houses and signed by the President, a procedure in exact accord with the constitutional requirements.

IT IS OBVIOUS, THEREFORE, THAT A DECISION AS TO WHETHER WHAT MAY BE TERMED THE SHIPPING CLAUSES OF OUR VARIOUS TREATIES (SUCH AS ARTICLES 3 AND 4 OF THE TREATY WITH AUSTRIA-HUNGARY OF 1829) STANDING ALONE OPERATE EX PROPRIO VIGORE IS NOT ESSENTIAL TO THIS CASE.

The United States in effect admits this. We quote from Judge BARBER'S opinion in the Court below:

> *"At the outset the Government unqualifiedly concedes that the said reciprocal commercial provisions are effective and in force as the law of the land, and that by virtue thereof any discount that may be legally allowed to merchandise imported in vessels of United States registry must also be allowed to the like merchandise when imported in vessels of the foreign-treaty nations—that is, if it is allowed to merchandise imported in our vessels, it cannot be denied to like merchandise imported in said foreign vessels without violating said reciprocal commercial provisions. It also concedes that it is within the*

jurisdiction of the judiciary to consider and construe said reciprocal provisions."

The nub of the Government's argument under point II. is that the addition of the proviso had for its object,

(a) "either to nullify the clause altogether by rendering it impossible of performance".

(b) or to "postpone the preference to American bottoms until our treaty relations can be modified so as to permit it".

The answer to *(a)* is found in that class of cases decided by this Court and cited in Judge BARBER'S opinion in support of the propositions:

> "It will be presumed that the lawmaking body will not do a vain thing, and that it intends that its acts and every part of them are valid and capable of being carried into effect" (Lewis's Sutherland Statutory Construction, sec. 497).
>
> "All statutes are to be so construed as to sustain rather than ignore or defeat them; to give them operation, if the language will permit, instead of treating them as meaningless" (Lewis's Sutherland Statutory Construction, sec. 498).
>
> *Bird vs. United States*, 187 U. S., 118.
> *Bernier vs. Bernier*, 147 U. S., 242.
> *Louisville Water Co. vs. Clark*, 143 U. S., 1.
> *Market Company vs. Hoffman*, 101 U. S., 112.
> *Platt vs. Railroad Company*, 99 U. S., 48.

As the Court below said in rejecting the Government contention and in adopting the conclusion reached by it:

> "not only do we give force and effect to all the language of the subsection and hold that the proviso is not repugnant to the body thereof but we also acquit Congress of the charge of having in form enacted a statute which, although clothed in language apt for present enforcement as to all its parts, was, nevertheless, not designed as a statute at all".

The answer to (*b*) lies in the fact that the modification of our treaty relations so as to permit exclusive preference to American bottoms is essentially one of the functions of Congress itself.

> "It is a common practice to insert in treaties a provision by which they may be terminated by notice of a duration, given by one contracting party to the other. *In the United States the question has arisen as to how this notice, when given by the President, should be authorized. Usually it has been given under the authority of a joint resolution of Congress*" (Moore, International Law Digest, Volume V., p. 322).

Innumerable instances can be cited in support of this. As typical, see joint resolution providing for the termination of the Reciprocity Treaty of 1854 between the United States and Great Britain approved Jan. 18, 1865 (13 U. S. Stat., 566); joint resolution terminating the Treaty of 1827 with Great Britain relating to the joint occupation of Oregon (9 U. S. Stat., 109); resolution of the Senate in Executive Session authorizing the President at his discretion to terminate the Treaty of Commerce with Denmark to 1826 (Executive Journal, Volume IX., pages 430 and 431). This latter resolution was based upon the view that the concurrent action of the two Houses was not necessary, but that the action of the Senate as one of the treaty making powers sufficed in conjunction with the action of the Executive. In the case of Russian Treaty, referred to in the dissenting opinion of Judge De Vries, it is true that the notice was first given by the Executive obviously to save a year's time by reason of the peculiar wording of the Article providing for the denunciation of the Treaty of 1832, but *it is significant that the sanction of Congress by a joint resolution was deemed important* (37 U. S. Stat., 627). It is confidently asserted that the only instance of action by the Executive alone is found in the case of the Swiss Treaty referred to

in the dissenting opinion, where two Articles only were denounced by this method.

That Congress was well aware of the *usual* practice with respect to the termination of treaties is apparent when it is borne in mind, as pointed out in the opinion of the Court below, that amendments were proposed providing for the abrogation of all treaties contravening discriminatory treatment in favor of American bottoms. The amendments were rejected (50th Cong. Rec., Part V., pages 4494 and 4548). It is a matter of public record that various measures for the relief of the American Merchant Marine have been proposed in Congress of late years and every one of them have carried sections directing the President to annul or abrogate the contravening articles in our commercial treaties in conformity with their stipulation, see:

Cong. Rec., 55th Cong., 1st Sess., Vol. 30, pp. 580–600.
58th Cong., 2nd Sess. Sen., 2154.
61st Cong., 2d Sess., H. R. Rep., 502, Part 2.
63d Cong., 1st Sess., H. R., 1930.

Section IV. of the Tariff Act of 1909 directed the President to terminate various Commercial Agreements entered into in conformity with authority granted by the Dingley law of 1897.

With undoubted knowledge of all these precedents, does it seem plausible to urge that Congress after rejecting amendments to terminate the treaties, intended by the adoption of the proviso to keep the law in a state of suspension until the Executive, quite contrary to the recognized practice, should at his convenience, without the direction of Congress, alone do the very thing which Congress had flatly declined to do? Does it seem plausible to urge that the Executive would have undertaken on his own responsibility without the direction of Congress to embark upon a policy calling for the wholesale abrogation of existing Commercial Treaties?

There is nothing that we can add to the admirable discussion which is found in Judge BARBER's opinion regarding the scope to be given to the words "impair or affect" in Subsection 7, except perhaps to emphasize that such phraseology has been selected by Congress on many occasions in harmony with the construction adopted by the Court below. See Section 6, Act of March 27, 1804, 2 U. S. Stat., 299, 300; Section 3, Act of February 5, 1816, 3 U. S. Stat., 253; Act of January 14, 1817, 3 U. S. Stat., 344. Note also Section 4, Paragraph B of the Act of October 3, 1913, which provides

> "that nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commerce and reciprocity concluded between the United States and the Republic of Cuba, etc."

It is said in the opinion of the dissenting Judge in the Court below:

> "How can it be said we discriminate in favor of American shipping when we give the same favor to all its important and effective competitors."

And further:

> "It appears from the majority opinion that there are at least 5,500 treaty-nation vessels in the American foreign trade. It is certain that there are not over 50 American vessels. Did Congress, in order to benefit these 50 vessels and such as might in the course of years—necessarily few under this interpretation—register under our flag immediately give an equal bounty to 5,500 other vessels? If so, where was the 'favor' to 'our ships'?"

This inquiry surely overlooks the statistics in the majority opinion with respect to British and French tonnage—the former far outstripping that of all other nations in magnitude;

it as certainly overlooks the official figures of the Department of Commerce which were recognized as authoritative by all parties and by the Court below, with respect to the trade in American vessels. These figures showed the entry in the foreign trade during the year ending June 30, 1913, of upwards of 9,322 American vessels, arriving with cargoes, the aggregate tonnage of which vessels was 6,423,356 tons, and 9,709 American vessels arriving in ballast having a tonnage of 6,649,211 tons. The large proportion of American vessels arriving in ballast is significant. The possibility of their carrying cargoes if this discount were operative at once suggests itself. (Commerce and Navigation of the United States, 1913, p. 875.)

The prevailing opinion clearly points to the disallowance of the discount on goods imported in French bottoms, and also in the case of the British indirect carrying trade. The latter item especially bulks large. The British merchant marine is in evidence in the four corners of the earth. Indeed, the respondents claim to have demonstrated in the Court below, and their claim was largely sustained by the majority opinion, that more than 8,000 vessels having a tonnage in excess of 12,000,000 tons, which entered at our ports during the fiscal year ending June 30, 1913, were unprotected by treaty guaranties.

All this was in effect pointed out to Congress in the communication of the Solicitor of the State Department and was presumably known to it. THE INFERENCE IS PLAIN THAT IN GRANTING THE DISCOUNT IN THE CASE OF AMERICAN BOTTOMS, CONGRESS REALIZED THAT IT WAS CONFERRING A SUBSTANTIAL FAVOR UPON THE AMERICAN MERCHANT MARINE, AND ONE THAT UNDER THE EXISTING TREATIES WOULD NOT BE CONFERRED UPON "ALL ITS IMPORTANT AND EFFECTIVE COMPETITORS."

Warehoused Goods.

Our adversary makes a contention under Point IV. that Sub-section 7 being prospective only cannot affect warehoused goods.

The law as to such merchandise has long been embodied in provisions corresponding to Section IV., Paragraph "Q" of the present law, and of Section III., Paragraph "S":

> SEC. IV., PAR. "Q": "That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bonds for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subject to the duties imposed by this Act and to no other duty, upon the entry or the withdrawal, thereof; *Provided*, That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."
>
> SEC. III., PAR. "S": "Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles."

It was this policy of law, no doubt, which led Congress to adopt the language in Paragraph "J", Subsection 7, that "a discount of 5 per centum on all duties *imposed by this Act*

shall be allowed." The plain effect of this language is to put warehouse goods withdrawn under the new law upon precisely the same terms as goods arriving and entered under the new law. Such a provision is entirely consistent and altogether in harmony with our settled policy with respect to warehouse goods which is founded on the theory, no doubt, THAT THE IMPORTATION OF FOREIGN GOODS IS NOT COMPLETE AS BETWEEN THE IMPORTER AND THE GOVERNMENT, SO LONG AS THE GOODS REMAIN IN THE CUSTODY OF THE OFFICERS OF THE CUSTOMS.

American Cigar Co. vs. United States, and
Falk vs. United States, 146 Fed. Rep., 484.
Hartranft vs. Oliver, 125 U. S., 525.
United States vs. Benzon, 2 Cliff, 512; 24 Fed. Cas., 1112, cited in *Fabbri vs. Murphy*, 95 U. S., 192.

The Board denies the claim as to such warehouse goods, whether imported in vessels of American or foreign registry. Two reasons are given for this attitude both of which can be conclusively answered.

First of all, it is said that "the language of Subsection 7 is that the discount shall be allowed on goods which 'shall be imported,' which implies a future importation" (Rec., 47). In the same way it must be said that, because the enacting clause of the Act of October 3d, 1913, provides that on and after the day following the passage of the act rates of duty "*shall* be levied, collected and paid upon all articles when imported from any foreign country," future importations only are implied. The answer is, of course, that warehouse goods are for tariff purposes future importations.

Cuban Goods.

The Government's contention in this respect is fully met and answered in the prevailing opinion on which counsel rely for an exhaustive discussion on this as on other branches of this case. A precise statement of the issue in this connection will solve such difficulties as might otherwise arise. Contrary to what seems to be intimated by the caption on page 12 of the Government's brief, the importers do not claim that Cuban goods or any other goods imported in Cuban vessels are entitled to the benefit of the five per cent. discount. They claim merely that Cuban goods are, like other goods, entitled to the discount when imported in American vessels. Nor is it accurate to say that the importers ask that a discount of five per cent. shall be added to the 20 per cent. preferential reduction provided by the Cuban treaty. The importers ask only what the treaty clearly demands, to wit, that the 20 per cent. preferential reduction be made from the duty actually applicable to the same kind of goods when imported into the United States from other countries. To deny the five per cent. discount to Cuban tobacco imported in American vessels, while allowing it to tobacco from other countries, would manifestly destroy the 20 per cent. preferential discrimination to which Cuban tobacco is entitled by the Cuban treaty.

American Goods.

Finally, it is to be remarked that nowhere in the brief of the Solicitor General, except by inference, does he controvert the contention that the discount should be allowed as to merchandise imported in American bottoms as found by the Court below and even by the Board.

It is respectfully submitted that the petition should be denied.

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THE FIVE PER CENT. DISCOUNT CASES.[1]

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Nos. 149 to 162. Argued February 25, 28, 1916; restored to docket for reargument March 6, 1916; reargued February 2, 1917.—Decided March 6, 1917.

Section IV, paragraph J, subsection 7, of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 114, 196, after declaring that a discount of five per centum on all duties imposed by the act shall be allowed on such goods as shall be imported in vessels admitted to registration under

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[1] The docket titles of these cases are: No. 149, *United States* v. *M. H. Pulaski Co., et al.;* No. 150, *United States* v. *R. B. Henry Co., et al.;* No. 151. *United States* v. *James Elliott & Co., et al.;* No. 152, *United*

the laws of the United States, adds, by way of proviso, "that nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." *Held*, that the grant of the discount is confined to goods in American bottoms, and the effect of the proviso is to respect the treaty privileges with which such a grant would be in conflict, not by extending the grant to goods borne in foreign vessels, but by suspending the grant entirely while such privileges exist.

6 Cust. App. Rep. 291, reversed.

THE case is stated in the opinion.

The Solicitor General for the United States:

The legislative history of § IV, paragraph J, subsection 7, shows it to be the result of a vain effort to compose differences between the House, which favored discriminating duties to American vessels, and the Senate, which resisted a disturbance of existing treaties. It was the purpose of the House to limit the discount to goods in American vessels only, thus discriminating in their favor against the ships of all other nations. The Senate was equally determined to brook no disturbance of existing treaties. The conference committee vainly endeavored to harmonize these divergent and wholly irreconcilable purposes.

The subsection is void by reason of the irreconcilability of its main clause and proviso; or at least is without present force or effect. The discount cannot be allowed to goods in American vessels alone, because, so construed, the

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States v. *J. Wile Sons & Co.*; No. 153, *United States* v. *Robert Muller & Co.*; No. 154, *United States* v. *Wood & Selick, et al.*; No. 155, *United States* v. *E. La Montagne's Sons*; No. 156, *United States* v. *Albert Lorsch & Co., et al.*; No. 157, *United States* v. *Cullman Brothers, et al.*; No. 158, *United States* v. *G. W. Faber, Inc.*; No. 159, *United States* v. *Louis Meyers & Son*; No. 160, *United States* v. *William Openhym & Sons, et al.*; No. 161, *United States* v. *Park & Tilford*; No. 162, *United States* v. *Selgas & Co.*

subsection would abrogate, impair or affect the provisions of existing treaties. If self-executing, the treaties would be abrogated or impaired by such a grant. A treaty is abrogated by a subsequent inconsistent statute. *Rainey* v. *United States*, 232 U. S. 310; *Taylor* v. *Morton*, 2 Curtis, 454; *Whitney* v. *Robertson*, 124 U. S. 190.

The treaties are, as a matter of fact, not self-executing but executory; nevertheless, Congress did not design to contravene them. *Foster* v. *Neilson*, 2 Pet. 253, 313. Congress has evidenced its understanding that the treaties are executory. Act March 1, 1816, 3 Stat. 255, c. 22; Act December 17, 1903, 33 Stat. 3, c. 1; Crandall, Treaties, their Making and Enforcement, p. 145; Willoughby on Constitution, § 209. The decisions regard the treaties as executory. *Taylor* v. *Morton, supra; Whitney* v. *Robertson, supra.*

The discount cannot be allowed to goods in both American and treaty vessels. Such was manifestly not the intent of Congress, nor is it the legal consequence of the words employed. The language of the act does not support the construction suggested. The proviso was not intended to enlarge the operation of the discount clause, but, on the contrary, to restrict it. It is the usual office of a proviso to "limit and restrict the operation of the enacting clause." *Minis* v. *United States*, 15 Pet. 423, 445; *Quackenbush* v. *United States*, 177 U. S. 20, 26; *White* v. *United States*, 191 U. S. 545, 551.

The discount is, *pro tanto*, an exemption from taxation. Such exemptions are not to be raised or extended by implication. *Central R. R. & Banking Co.* v. *Georgia*, 92 U. S. 665, 674; *Ford* v. *Delta and Pine Land Co.*, 164 U. S. 662, 666.

Congress was fully advised of the apt words proper to accomplish an extension of the grant, and declined to use them.

To grant the discount to goods in American and treaty

bottoms alike would result in no substantial benefit to the former but would be a virtual donation to shippers in the latter and a wholly useless sacrifice of revenue. Results of allowance of discount to American and treaty bottoms demonstrate that Congress did not intend such construction. A discrimination against non-treaty ships alone is not a discrimination in favor of American vessels. There is evidence elsewhere in the act that Congress had no thought of singling out for discrimination British and French vessels in the indirect trade and ships of non-treaty countries.

The discrimination, if directed solely against non-treaty vessels, could have been more clearly and effectively accomplished without sacrifice of revenue by modifying § IV, paragraph J, subsection 1, and adding five per cent. to the discriminating duty of ten per cent. thereby imposed. In order to make the discount clause presently effective, a meaning should not be enforced which is repugnant to the main, revenue-producing portions of the act. *Van Dyke* v. *Cordova Copper Co.*, 234 U. S. 188.

Since it is impossible to give to the act any application to existing circumstances, it must be declared void, or operative only upon future condition. *Farmers' Bank* v. *Hale*, 59 N. Y. 53; *In re Hendricks*, 60 Kansas, 796, 806; *United States* v. *Cantril*, 4 Cranch, 167.

Mr. Frederick W. Lehmann and *Mr. James M. Beck* for respondents. The following counsel, representing various respondents, were also on the brief: *Mr. Thomas M. Lane, Mr. Albert H. Washburn, Mr. George J. Puckhafer, Mr. John A. Kratz, Mr. Henry J. Webster, Mr. John G. Duffy, Mr. Frederick W. Brooks, Jr., Mr. B. A. Levett, Mr. Rufus W. Sprague, Jr., Mr. Edward P. Sharretts, Mr. Homer S. Cummings, Mr. James L. Gerry, Mr. Edwin R. Wakefield* and *Mr. Allan R. Brown.*

The proviso operates to prevent the possible repeal

of the treaties by the later act, and in effect makes the treaty stipulations a part of the act, of equal efficacy with the provision for discount. The resulting law of the case is that the duties prescribed by the Tariff Act are to be discounted five per cent. on imports in American bottoms and no other or higher duties are to be levied upon imports in the vessels of treaty nations than in those of the United States. The number of such treaty nations would not alter the terms of the act and so could not alter its construction.

It is immaterial whether or not the treaty clauses involved operate *ex proprio vigore*, since the very statute under consideration gives them the force and effect of laws. Congress has recognized that such treaty provisions are self-executing. Treaty with Great Britain, 1815; Act of March 1, 1916, 3 Stat. 255; 14th Annals of Congress, 1st sess., p. 674; *ibid.*, pp. 46, 49–50; Reports of Committee on Foreign Relations, 1789–1901, vol. 8, p. 25. The executive branch has treated similar treaty provisions as self-executing without legislation by Congress. Treasury Decision, 20386; Foreign Relations U. S., 1899, pp. 740 *et seq.*; Act August 30, 1842, 5 Stat. 560. *Bartram* v. *Robertson*, 122 U. S. 116, compared.

The view that treaty provisions are executory contracts whose fulfillment is addressed solely to Congress has been repeatedly disavowed by this court. *Foster* v. *Neilson*, 2 Pet. 253, explained; *United States* v. *Percheman*, 7 Pet. 51, 89; *United States* v. *Schooner Peggy*, 1 Cranch, 103; *Ware* v. *Hylton*, 3 Dall. 199; *Hauenstein* v. *Lynham*, 100 U. S. 483; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *Tucker* v. *Alexandroff*, 183 U. S. 424, 429; *Oldfield* v. *Marriott*, 10 How. 146; *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *Rainey* v. *United States*, 232 U. S. 310, 316; *Head Money Cases*, 112 U. S. 580, 598; *DeLima* v. *Bidwell*, 182 U. S. 1, 195. *Taylor* v. *Morton*, 2 Curtis, 254, distinguished.

Congress had power to grant the discount to imports in vessels of the United States and of nations with which the United States had reciprocal commercial treaty agreements. The contention of the Government makes the proviso a condition to the taking effect of the main clause and destroys the subsection in its entirety, while respondents' construction gives effect to the subsection as a whole, *Austin* v. *United States*, 155 U. S. 417, distinguished; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *McLean* v. *United States*, 226 U. S. 374, 383.

The function of a proviso is to be determined in each case by what is there intended. It is frequently used to enlarge the operation of a law as well as to restrict it. *Georgia R. & B. Co.* v. *Smith*, 128 U. S. 174, 181; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 36.

A rational interpretation will be given to a statute and a proviso and not one by which the statute will, through the proviso, destroy itself. *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *United States* v. *Mille Lac Chippewas*, 229 U. S. 498.

The provision as it stands, and considered with reference to its terms, has a meaning and bears a sensible construction. It is not a meaningless or contradictory jumble of words. Explaining or distinguishing: *United States* v. *Cantril*, 4 Cranch, 167; *City of Mobile* v. *Eslava*, 16 Pet. 234, 247; *In re Hendricks*, 60 Kansas, 796; *Farmers' Bank* v. *Hale*, 59 N. Y. 53; *International Harvester Company* v. *Kentucky*, 234 U. S. 216; *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 254.

The provision is not self-contradictory, nor contradictory of the reason of the legislation which was discrimination in favor of American shipping. Upon the contrary, the statute is responsive to that reason and in aid of that purpose. *Pirie* v. *Chicago Title and Trust Co.*, 182 U. S. 438, 451.

The addition of the proviso diminished but did not

exhaust the discrimination effected by the main clause. This goes to the usefulness of the statute and not its meaning or validity. *United States* v. *Plowman*, 216 U. S. 372, 375; *Unity* v. *Burrage*, 103 U. S. 447, 456.

It is not permitted under any rule of statutory construction to say that the proviso was a stroke of legislative *finesse*, designed by the Senate to nullify the section as formulated by the House, under pretense of merely qualifying it. Nothing savoring of fraud or farce may be imputed to either house. *McLean* v. *United States*, 226 U. S. 374, 383.

Courts will decline to avoid an act of legislation upon any suggestion as to the motives of legislators or of the unwisdom or impolicy of the act. *Weber* v. *Freed*, 239 U. S. 325, 330; *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72; *United States* v. *Goldenberg*, 168 U. S. 95, 102; *Dewey* v. *United States*, 178 U. S. 510, 521.

In our legislation the intent to save treaty rights has always been manifest. The form of words employed has varied, but language similar to that of the proviso to subsection 7 has been frequently used. Acts of March 27, 1804, § 6, 2 Stat. 300, c. 57; February 5, 1816, § 3, 3 Stat. 253, c. 10; April 27, 1816, § 6, 3 Stat. 314, c. 107; January 14, 1817, § 1, 3 Stat. 344, c. 3; August 30, 1842, § 8, par. 5, 5 Stat. 560, c. 260; Messages and Papers of the Presidents, vol. IV, pp. 400, 401; Act July 14, 1862, § 15, 12 Stat. 558, c. 163; Act March 3, 1883, § 11, 22 Stat. 525, c. 121; *Kelly* v. *Hedden*, 124 U. S. 196.

In more recent tariff legislation, Congress, in effecting its purpose of saving treaty rights, has repeatedly expressed a preference for the precise form of language found in the proviso of subsection 7. Act March 3, 1891, 26 Stat. 844, c. 524; Treasury Decision, 10824; Acts of August 27, 1894, par. 182½, 28 Stat. 521, c. 349; July 24, 1897, par. 209, 30 Stat. 168; August 5, 1909, § 3, 36 Stat. 83, c. 6; October 3, 1913, § IV, par. B, 38 Stat. 192.

The act is not to be nullified as unwise or impolitic because it may not in its immediate operation discriminate in favor of American shipping to the extent Congress intended should ultimately result. By the express terms of its proviso, it recognizes that the scope of its discrimination will be reduced by treaty provisions. There are nations whose trade is not protected by any treaty, and the treaties of some other nations are not comprehensive of all their trade with us. To such unprotected trade the discount would not apply. The legislation, as its history shows, was deliberately enacted, with a full knowledge of the facts and circumstances to which it applied, and of how it would operate, and with its consequences very distinctly pressed upon the attention of Congress. Each house of Congress conceded something and each house held to something of its views. The House of Representatives secured the discount on imports in American vessels and the Senate the preservation of our treaty stipulations by extending the discount to imports in treaty nation vessels. A present advantage to American shipping was intended, which would be great or small as the field of the practical operation of the proviso was small or great—an advantage which might be enlarged from time to time by changes in our treaty agreements. Subsections 1 and 7 of paragraph J of § IV of the Tariff Act of October 3, 1913, are laws of the same general nature operating by converse methods. In each case the advantage conferred by the general enactments upon American vessels is diminished by the proviso or qualifying clause as to treaty nation vessels; in the one case by suspending the discriminating duty and in the other by extending the discount. In neither case does the proviso nullify the subsection.

Substantial discrimination in favor of American vessels in fact results from respondents' construction. The official figures of our foreign commerce show that, by the inducement of the five per cent. discount, the volume

of merchandise imported in American vessels may be greatly increased. The extent to which other nations share the discount affects only the measure in which the obvious purpose of the act is realized in operation.

Mr. William L. Wemple, by leave of court, filed a brief as *amicus curiæ*.

Mr. Edward S. Hatch and *Mr. Walter F. Welch*, by leave of court, filed a brief as *amici curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

In these cases the Court of Customs Appeals has held that by § IV, paragraph J, subsection 7, of the Act of October 3, 1913, c. 16, 38 Stat. 114, 196, merchandise imported in the registered vessels of the United States, or in the registered vessels of other nations entitled by treaty to pay no higher duties than those levied upon vessels of the United States, is granted a discount of five per cent. upon the duties imposed by the act. Following an enactment that, except as otherwise specially provided in the statute, duties should be levied upon all articles imported from any foreign country at the rates prescribed in the schedules, the above mentioned subsection 7 is as follows: "That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation." More or less complete reciprocity is established by treaty with nearly all the commercial countries of the world, and the discount of five per centum was extended by the Court of Customs Appeals to goods imported in vessels of Belgium, the

Netherlands, Great Britain, Austria-Hungary, Germany, Italy, Spain and Japan.

The Government contends that while the subsection may indicate a reversal of the policy of reciprocity that has prevailed more or less for the better part of a century, Rev. Stats., § 4228, it relies upon future negotiations to make the change effective and suspends action while the present treaties remain in force, since it could not give the discount to merchandise in American bottoms alone without breaking the numerous treaties to which we have referred. The argument on the other side is that the words of the subsection are satisfied by extending the discount to goods from all the treaty countries, whereas by the construction contended for by the Government they are emptied of meaning or at least of present effect. We are of opinion that the Government is right, and as the meaning of the words seems to us to be intelligible upon a simple reading and to be fortified by the facts preceding their adoption, we shall spend no time upon generalities concerning the principles of interpretation.

We have a clear opinion as to what the subsection means if the words are taken in their natural, straightforward and literal sense. It grants a discount only to goods imported in vessels registered under the laws of the United States, and conditions even that grant upon its not affecting treaties. There is a strong presumption that the literal meaning is the true one, especially as against a construction that is not interpretation but perversion; that takes from the proviso its ostensible purpose to impose a condition precedent, in order to universalize a grant that purports to be made to a single class, and to do so notwithstanding the express requirement of the statute that specified rates should be paid. Nobody would express such an intent in such words unless in a contest of opposing interests where the two sides both hoped to profit by an ambiguous phrase. But the section is

not ambiguous on its face, and there is no sufficient ground for creating an ambiguity from without, when it is considered that the purpose to favor American shipping was the manifest inducement for putting the subsection in.

The tariff bill as it first passed the House granted an exemption in favor of American shipping without the proviso. The clause was struck out by the Senate, and after it had been pointed out that such an enactment would violate many treaties there was a conference which led to the passage of the subsection in its present form. It seems to us obviously more reasonable to suppose that Congress was content to indicate a policy to be pursued when possible than that by circuitous and inapt language it enacted that there should be a general discount from the rates specifically directed to be charged. That the subsection means what it says and no more seems to us still plainer when it is considered that without going into nice calculations the benefit to American shipping of such a general discount would be at least problematical and certainly would be relatively small. A grant in present terms subject to a condition precedent is familiar to the law and is not unknown in grants of the present kind. *Dunlap* v. *United States*, 173 U. S. 65.

There was some discussion at the bar and in the court below upon the question whether the treaties operated as laws or were simply executory contracts, but it seems to us superfluous. If the statute bore the meaning attributed to it below it granted the discount to the nations having treaties of reciprocity, even if those treaties were only contracts. As in our opinion the subsection means what it says it grants the discount to none.

Judgments allowing the discount of five per centum reversed.

MR. JUSTICE DAY is of opinion that the statute was interpreted correctly by the Court of Customs Appeals, and therefore dissents.